NO. 10104

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR and JOHN EDWARD RUSSELL, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, et al.,

Appellees,

and

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR and JOHN EDWARD RUSSELL, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, et al.,

Appellees.

Transcript of Record

Upon Appeals from the District Court of the United States for the District of Hawaii.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 50-9-14-43

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

For the Petitioner:

The United States of America:

JOHN J. COURTNEY,
Special Assistant to the Attorney General, and

ANGUS M. TAYLOR, JR.,
United States Attorney,
District of Hawaii,
Federal Building, Honolulu, T. H.,

For the Defendants:

John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear, and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased,

Mr. A. G. M. ROBERTSON of the firm of Robertson, Castle & Anthony,
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Honolulu Plantation Company,

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404 Alexander & Baldwin Building,
Honolulu, T.H.,

Bishop National Bank of Hawaii at Honolulu,
SMITH, WILD, BEEBE & CADES,
Bishop Trust Building, Honolulu, T.H.,

Territory of Hawaii,
Mr. J. V. HODGSON, Attorney General,
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City and County of Honolulu,
Mr. JON WIIG, City and County Attorney,
City Hall, Honolulu, T.H.,

Frank Leialoha Kaleimamahu,
Mr. CHARLES B. DWIGHT,
Damon Building, Honolulu, T.H. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court
for the Territory of Hawaii

Civil No. 434

THE UNITED STATES OF AMERICA,
Petitioner

vs.

CERTAIN PARCELS OF LAND on the Island of Oahu, Territory of Hawaii, et al., etc.,
Defendants.

Civil No. 436

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

254.468 acres of land, more or less, in Moanalua, Honolulu, Island of Oahu, Territory of Hawaii, et al., etc.
Defendants.

CLERK'S STATEMENT

Time of Commencing Suit:

Civil No. 434	
November 20, 1940	Petition filed
Civil No. 436	
November 27, 1940	Petition filed

Names of Original Parties:

Civil No. 434

The United States of America, Petitioner
Certain Parcels of Land on the Island of Oahu,
John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear, and John Edward Russell, Trustees, Honolulu Plantation Company,
Bishop National Bank of Hawaii at Honolulu,
Territory of Hawaii, and City and County of Honolulu, Defendants

[2]

Civil No. 436

The United States of America, Petitioner
254.468 acres of land,
John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear, and John Edward Russell, Trustees, Honolulu Plantation Company,
Bishop National Bank of Hawall at Honolulu,
Territory of Hawaii, and City and County of Honolulu, Defendants

Dates and Filing Pleadings:

Civil No. 434

November 20, 1940	Petition for Condemnation
	Declaration of Taking
	Certified copy Letter of Necessity
	Order and Judgment on Declaration of Taking
December 10, 1940	Answer of the Trustees under the Will of Samuel M. Damon, Deceased

December 30, 1940	Answer of Bishop National Bank of Hawaii at Honolulu
January 22, 1941	Answer and Disclaimer (City and County of Honolulu)
January 23, 1941	Disclaimer of the Territory of Hawaii
April 8, 1941	Motion for Order of Payment of Deposit and Notice
April 15, 1941	Order for Distribution of Money Deposited
July 29, 1941	Motion for a Direct Verdict
July 31, 1941	Verdict
August 18, 1941	Order for Judgment
November 15, 1941	Judgment

Civil No. 436

November 27, 1940	Petition for Condemnation
	Declaration of Taking
	Certified copy Letter of Necessity
	Order and Judgment on Declaration of Taking [3]

Civil No. 436 (Continued)

December 10, 1940	Answer of the Trustees under the Will of Samuel M. Damon, Deceased
December 20, 1940	Appearance (Chas. B. Dwight)
January 23, 1941	Answer of the City and County of Honolulu

January 23, 1941	Disclaimer of the Territory of Hawaii
April 8, 1941	Motion for Order of Payment of Deposit and Notice
April 15, 1941	Order for Distribution of Money Deposited
July 29, 1941	Motion for a Direct Verdict
July 31, 1941	Verdict
August 18, 1941	Order for Judgment
November 15, 1941	Judgment

Dates When Proceedings Were Had:

Civil No. 434

November 20, 1940	Title of lands vested in the United States of America; Order and Judgment on Declaration of Taking signed and ordered filed.

Civil No. 436

November 27, 1940	Title of lands vested in the United States of America; Order and Judgment on Declaration of Taking signed and ordered filed.

Civil Nos. 434 and 436

July 21, 1941	Consolidation of cases for trial; Jury empaneled; Trial
July 22, 1941	Further trial
July 23, 1941	Further trial
July 24, 1941	Further trial
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Civil Nos. 434 and 436 (Continued)

July 29, 1941	Further trial
July 30, 1941	Further trial
July 31, 1941	Verdicts

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Dates of Filing Appeal Documents:

Civil No. 434

November 15, 1941	Notice of Appeal
	Order Enlarging Time
	Order Enlarging Time for Serving and Filing the Designation of Record on Appeal

Civil No. 436

November 15, 1941	Notice of Appeal
	Order Enlarging Time
	Order Enlarging Time for Serving and Filing the Designation of Record on Appeal

Civil Nos. 434 and 436

February 2, 1942	Stipulation and Agreement for Consolidation
February 3, 1942	Order Consolidating Causes on Appeal
February 4, 1942	Motion for Order for Transmittal of Original Exhibits
	Order for Transmittal of Original Exhibits
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CERTIFICATE OF CLERK TO THE ABOVE STATEMENT

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the [5] foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled causes; the names of the original parties, the dates when the respective pleadings were filed; the dates when proceedings were had; the name of the judge presiding; and the dates when appeal pleadings were filed in the above entitled causes.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of March, A. D. 1942.

(Seal) WM. F. THOMPSON, JR.,
Clerk,
United States District Court,
Territory of Hawaii. [6]

In the United States District Court
for the Territory of Hawaii

October 1940 Term

Civil No. 434

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

CERTAIN PARCELS OF LAND on the Island of Oahu, Territory of Hawaii, JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR and JOHN EDWARD RUSSELL, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, HONOLULU PLANTATION COMPANY, BISHOP NATIONAL BANK OF HAWAII AT HONOLULU, TERRITORY OF HAWAII, CITY AND COUNTY OF HONOLULU, JOHN DOE ONE TO JOHN DOE FIFTY, INCLUSIVE and MARY ROE ONE TO MARY ROE FIFTY, INCLUSIVE, unknown owners and claimants,
Defendants.

PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judge of the United States District Court for the Territory of Hawaii:

Comes now The United States of America, Petitioner herein, by John E. Parks, Assistant United

States Attorney for the District of Hawaii, and acting under instructions of the Attorney General and at the request of the Administrator of the Federal Works Agency, respectfully shows as follows:

I.

That in accordance with the Act of Congress approved October 14, 1940 (Public No. 849—76th Congress), the President [8] of the United States of America has found that an acute shortage of housing exists in the area in or about the Island of Oahu, Territory of Hawaii; that pursuant to this finding and by virtue of the authority vested in him by the Act of August 1, 1888, 25 Stat. 357, (United States Code, Title 40, Section 257); the Act of February 26, 1931, 46 Stat. 1421 (United States Code, Title 40, Secs. 258 (a) to 258 (e)); the Act of October 14, 1940 (Public No. 849—76th Congress), funds having been appropriated under the Act of September 9, 1940 (Public 781, 76th Congress) and transferred to the Federal Works Agency under the provisions of said Act of October 14, 1940 (Appropriation title "80-11X0004 (10) Emergency Fund for the President, National Defense Housing) transfer from war to said Federal Works Agency, Public Buildings Administration)"), the Administrator of the Federal Works Agency has selected for acquisition by the United States of America the land hereinafter described and has designated that said land and the title in fee simple absolute are suitable and necessary for the purposes of the

United States as a site for housing, for persons engaged in national defense activities and their families, which lands are situate at Moanalua, City and County of Honolulu, Island of Oahu, Territory of Hawaii, and being more particularly described as follows:

Beginning at a point marked by a Territorial Highway Monument set in the southwesterly side of Dillingham Boulevard, said point being a corner of the United States Military Reservation designated as Hickam Field; thence from said monument the following azimuths (measured clockwise from true south) and distances:

(1) Along Dillingham Boulevard to a monument 296° 10′ 30″, 1293 feet;

(2) thence 26° 10′ 30″, 2047 feet to a monument; [9]

(3) thence 118° 14′ 30″, 2044.25 feet to a monument;

(4) thence 226° 59′ 00″, 2110.93 feet to the point or place of beginning,

containing an area of 77.288 acres, more or less, and designated as Lots C-1 and C-2, as shown by plat "Land proposed to be acquired through condemnation proceedings for the Defense Housing Project at Fort Kamehameha and Hickam Field, Hawaii", blue print of which is attached hereto and by reference made a part hereof and marked Exhibit "A",

together with all improvements thereon.

II.

That the interest sought to be condemned is an estate in fee simple absolute.

III.

That the information acquired by Petitioner indicates that the following persons are the purported owners of or may have some interest in the lands which are part and are contained in the interior boundaries of the above described area:

John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, Honolulu Plantation Company, Bishop National Bank of Hawaii at Honolulu, Territory of Hawaii, City and County of Honolulu, John Doe One to John Doe Fifty, inclusive and Mary Roe One to Mary Roe Fifty, inclusive, unknown owners and claimants,

whom are hereby made parties defendants to the end that they may come into this Court and by proper pleadings establish their claims, if any.

And in this behalf the Petitioner further avers and shows that John Doe One to John Doe Fifty, inclusive, and Mary Roe One to Mary Roe Fifty, inclusive, named herein as defendants, are fictitious [10] names and represent owners and claimants of interests in said property, the true names of whom are unknown to Petitioner and are therefore

made parties to this action by the name and description as aforesaid.

The above named defendants generally and all and singular the heirs, husbands, wives, devisees, executors, administrators, representatives, alienees, successors, assigns of each and every of the above named persons, and all unknown owners, lienors, and claimants having or claiming any right, title, estate, equity, interest or lien; and all occupants, lessees, licensees of and users and holders of said land and all owners or claimants to easements in, on, over, across or through said land; and all persons, companies, and corporations claiming any title or interest to or in the whole or any part of any of said tracts of land; are hereby made parties defendant to the end that they may come into Court and by proper pleadings make claim to said lands, or to the proceedings arising therefrom.

Wherefore, Petitioner prays that the Court ascertain and determine according to law the compensation or damages for the taking of the land to be herein condemned; to ascertain and determine the rightful owners thereof and the parties entitled to the sum awarded as just compensation for said land; and upon payment to, or into the Registry of the Court for the use of, the persons entitled thereto, of the sum adjudged to be just compensation for the land condemned, to adjudge and decree that the title to said land is vested in the United States of America in fee simple absolute, and to grant such

other and further relief as may be lawful and proper.

THE UNITED STATES OF AMERICA,
Petitioner
By (s) JOHN E. PARKS,
Assistant United States Attorney,
District of Hawaii. [11]

The United States of America,
District of Hawaii—ss.

John E. Parks, being first duly sworn on oath, deposes and says:

That he is Assistant United States Attorney for the District of Hawaii; that he has read the foregoing Petition for Condemnation and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

JOHN E. PARKS

Subscribed and sworn to before me this 20th day of November, 1940.

(Seal) (s) WM. F. THOMPSON, JR.
Clerk,
United States District Court
for the Territory of Hawaii

[Endorsed]: Filed Nov. 20, 1940. [12]

[Title of District Court and Cause—Civil 434.]

DECLARATION OF TAKING

I, John M. Carmody, Federal Works Administrator of the Federal Works Agency of the United States of America, do hereby declare that:

1. (a) The lands described in Schedule A hereto attached are hereby taken for the use of the United States under the authority of the Act of August 1, 1888, 25 Stat. 357 (U. S. C. Title 40, Sec. 257); the Act of February 26, 1931, 46 Stats. 1421 (U. S. C. Title 40, Secs. 258(a) to 258(e)); the Act of October 14, 1940 (Public No. 849, 76th Congress), funds having been appropriated under the Act of September 9, 1940 (Public No. 781, 76th Congress) and transferred to the Federal Works Agency under the provisions of said Act of October 14, 1940. (b) The public use for which lands are taken is the purposes prescribed in said Act of October 14, 1940.

2. A description of said lands sufficient for the identification thereof is set forth in Schedule A, annexed hereto and made a part hereof.

3. The estate taken for said public use is the full fee simple title in and to said lands.

4. A plan showing said lands is annexed hereto as Schedule B [14] and made a part hereof.

5. The sum of money estimated by me to be just compensation for said lands, including all buildings and improvements thereon, if any, all appurtenances thereto, and all interests therein is set forth in Schedule A annexed hereto and made a part hereof.

Said sum I herewith deposit in the registry of this Court to the use of the persons entitled thereto.

I am of the opinion that the ultimate award of compensation for the taking of said lands will be within any limits prescribed by law to be paid as the price therefor.

In Witness Whereof, I, John M. Carmody, Federal Works Administrator, thereunto duly authorized have signed this Declaration of Taking, as Federal Works Administrator this 15th day of November, 1940, in the City of Washington, District of Columbia.

UNITED STATES OF AMERICA
By JOHN M. CARMODY
Federal Works Administrator [15]

SCHEDULE "A"

A tract of land lying and being at Moanalua, City and County of Honolulu, Territory of Hawaii, and described as follows:

Beginning at a point marked by a Territorial Highway Monument set in the southwesterly side of Dillingham Boulevard, said point being a corner of the United States Military Reservation designated as Hickam Field; thence from said monument following azimuths (measured clockwise from true south) and distances:

(1) Along Dillingham Boulevard to a monument 296° 10′ 30″, 1293 feet;

(2) thence 26° 10′ 30″, 2047 feet to a monument;

(3) thence 118° 14′ 30″, 2044.25 feet to a monument;

(4) thence 226° 59′ 00″, 2110.93 feet to the point or place of beginning,

containing an area of 77.288 acres, more or less, and designated as Lots C-1 and C-2, as shown by plat "Land proposed to be acquired through condemnation proceedings for the Defense Housing Project at Fort Kamehameha and Hickam Field, Hawaii", blueprint of which is attached hereto and by reference made a part hereof; together with the improvements thereon.

The sum of money estimated by the acquiring authority to be just compensation for the aforesaid land in this proceeding and hereby taken is $33,498.00.

United States of America

DEPARTMENT OF JUSTICE

November 15, 1940

Pursuant to Title 28, Section 661, U. S. Code (Sec. 882, Revised Statutes), I hereby certify that the annexed paper is a true copy of the original record in this Department, of a letter dated November 15, 1940, from John M. Carmody, Admin-

istrator, Federal Works Agency, to the Attorney General, requesting the institution of a condemnation proceeding, and the filing therein of a declaration of taking, for the acquisition of certain lands at Moanalua, Honolulu, County of Honolulu, Island of Oahu, Territory of Hawaii, for use as a site for housing for persons engaged in national defense activities.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

[Seal] NORMAN M. LITTELL
Assistant Attorney General. [18]

FORT KAMEHAMEHA, HAWAII
HICKAM FIELD
DEFENSE HOUSING PROJECT

In reply please quote: L-McC

November 15, 1940

The Honorable,

The Attorney General of the United States.

My dear Mr. Attorney General:

The President of the United States has found, pursuant to the provisions of the Act of October 14, 1940 (Public No. 849, 76th Congress), that in the area in or about the Island of Oahu, Territory of Hawaii, an acute shortage of housing exists or im-

pends which will impede national defense activities. By virtue thereof and pursuant to the authority vested in me by the Act of August 1, 1888, 25 Stat. 357 (U. S. C. Title 40, Sec. 257); the Act of February 26, 1931, 46 Stat. 1421 (U. S. C. Title 40, Secs. 258(a) to 258(e)); the Act of October 14, 1940 (Public No. 849, 76th Congress), funds having been appropriated under the Act of September 9, 1940 (Public No. 781, 76th Congress) and transferred to the Federal Works Agency under the provisions of said Act of October 14, 1940 (appropriation title "80-11X0004(10) Emergency Fund for the President, National Defense Housing (transfer from War to Federal Works Agency, Public Buildings Administration)"), I have selected as a site for housing for persons engaged in national defense activities, and their families, certain lands at Moanalua, lying and being in the City of Honolulu, County of Honolulu, on the Island of Oahu, Territory of Hawaii, and more particularly described in Schedule A attached to and forming a part of the Declaration of Taking.

I am informed that this land is owned by the Damon Estate.

I am of the opinion that it is necessary and advantageous to the interests of the United States that said land be acquired by condemnation. I have the honor, therefore, to request that you cause the necessary proceedings to be instituted (including the filing of a Declaration of Taking) for the im-

mediate acquisition, by condemnation, of said land together with all improvements thereon and any leaseholds and other interests therein.

Prior to confirmation of any award will you kindly cause to be submitted to this Agency for consideration a statement showing the damages proposed to be allowed, separately, for land, buildings, leaseholds and other interests, and indicating the period of time within which such award must be confirmed. [19]

I enclose herewith the following:

(a) Copy of the Construction Engineer's report, together with copies of offer for the sale of the land submitted on behalf of the Damon Estate, as has been received;

(b) Declaration of Taking;

(c) A check of the United States drawn in favor of Clerk of the United States District Court for the District of Hawaii, in the amount of $33,498.00, representing the sum of money which I have estimated to be just compensation for the land to be taken.

Kindly advise the United States Attorney or Special Attorney in charge of the case that the information contained in the Construction Engineer's report is confidential.

Sincerely,

JOHN M. CARMODY
Administrator

[Endorsed]: Filed Nov. 20, 1940. [20]

[Title of District Court and Cause—Civil No. 434.]

ORDER AND JUDGMENT ON DECLARATION OF TAKING

It appearing to this Court that on the 20th day of November, 1940, the United States of America filed herein a Petition for Condemnation of certain lands hereinafter described and that together therewith was filed a Declaration of Taking signed by John M. Carmody, Administrator of the Federal Works Agency, acting in accordance with a finding by the President of the United States of America (as provided by the Act of October 14, 1940, Public 849, 76th Congress) that an acute shortage of housing exists in the area in or about the Island of Oahu, Territory of Hawaii and, by virtue of the authority vested in him by the Act of August 1, 1888, 25 Stat. 357 (U. S. C. Title 40, Sec. 257); the Act of February 26, [22] 1931, 46 Stat. 1421 (U. S. C. Title 40, secs. 258(a) to 258(e); the Act of October 14, 1940 (Public No. 849, 76th Congress, funds having been appropriated under the Act of September 9, 1940 (Public No. 781, 76th Congress) and transferred to the Federal Works Agency under the provisions of said Act of October 14, 1940; and

It appearing that said Declaration of Taking sets forth the taking of the fee simple title to said lands for the uses and purposes described in said acts of authority; and further sets forth the ascertaining of just compensation for said lands to be deposited into the Registry of this Court for the use of the

persons entitled thereto in the amount of the estimated compensation for the purchase of said lands; and

Whereas it further appears that there has been paid into the Registry of this Court the sum of Thirty Three Thousand Four Hundred Ninety-Eight Dollars ($33,498.00), with the schedule designating the funds as the estimated just compensation for the taking of said lands, said lands being described as follows:

Beginning at a point marked by a Territorial Highway Monument set in the southwesterly side of Dillingham Boulevard, said point being a corner of the United States Military Reservation designated as Hickam Field; thence from said monument the following azimuths (measured clockwise from true south) and distances:

(1) Along Dillingham Boulevard to a monument 296° 10′ 30″, 1293 feet;

(2) thence 26° 10′ 30″, 2047 feet to a monument;

(3) thence 118° 14′ 30″, 2044.25 feet to a monument;

(4) thence 226° 59′ 00″, 2110.93 feet to the point or place of beginning

situated at Moanalua, City and County of Honolulu, Island of Oahu, Territory of Hawaii, and containing an area of 77.288 acres, more or less, and designated as Lots C-1 and C-2, as shown by plat "Land proposed to be acquired through condemnation proceedings for the Defense

Housing Project at Fort Kamehameha and Hickam Field, Hawaii", blue print of which is attached to the Petition for Condemnation herein [23]

And good cause appearing,

It is hereby Ordered and Adjudged that the title to the lands hereinabove described is indefeasibly vested in the United States of America;

And it is further Ordered and Adjudged that the owners, claimants, and occupants of said lands and every part and parcel thereof forthwith deliver to the Petitioner herein, and to its duly authorized agents, the immediate and exclusive possession of said lands;

And it is further Ordered that a certified copy of this Order with a certificate of the Clerk of this Court showing the payment into the Registry of the Court of the sum hereinabove set forth, shall be served upon each and every person or persons in possession of said lands.

And it is further Ordered that due and legal service be had upon all of the persons, firms and corporations named as defendants or claimants in the petition on file herein, and all and singular their heirs, husbands, wives, devisees, executors, administrators, representatives, alienees, successors and assigns of each and every named person, firm and corporation, and all unknown owners, lienors and claimants having or claiming any title, estate, equity or lien, and all occupants, lessees, licensees

and users and holders and owners of and claimants to easements in, on, over, across or through said lands; and all persons, companies and corporations claiming any title to or in any of said tracts of land requiring said parties to answer in this cause setting forth any claim, right, title, interest or possession of any kind or nature in and to said described lands.

Dated: Honolulu, Territory of Hawaii, this 20th day of November, 1940.

D. E. METZGER,
Judge

[Endorsed]: Filed Nov. 20, 1940. [24]

[Title of District Court and Cause—Civil No. 434.]

ANSWER OF THE TRUSTEES UNDER THE WILL OF SAMUEL M. DAMON, DECEASED.

Now come John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, defendants in the above entitled cause, and answering the petition filed in said cause, allege and show as follows:

I.

That they have not sufficient knowledge, or information to form a belief as to the matters and things alleged in paragraph I of said petition to either

admit [30] or deny the same, and therefore leave the petitioner to its proof thereof.

II.

That these defendants are the owners in fee simple of the property described in said petition, subject only to a leasehold interest held by Honolulu Plantation Company, expiring the 31st day of December 1943.

Wherefore, these defendants pray that in case said property shall be condemned and taken as prayed for in and by said petition, the value thereof and the compensation to be paid therefor may be determined and ordered to be paid to these defendants.

Dated, Honolulu, T.H., December 10, 1940.

JOHN WATERHOUSE,
ERNEST HAY WODEHOUSE,
WALTER FRANCIS FREAR and
JOHN EDWARD RUSSELL,
Trustees under the Will and of the Estate of Samuel M. Damon, deceased,
By ROBERTSON, CASTLE & ANTHONY
By A. G. M. ROBERTSON,
their attorneys.

(Acknowledgment of service.)

[Endorsed]: Filed Dec. 10, 1940. [31]

[Title of District Court and Cause—Civil No. 434.]

ANSWER OF BISHOP NATIONAL BANK OF HAWAII AT HONOLULU

Comes now Bishop National Bank of Hawaii at Honolulu, one of the defendants in the above entitled cause, and for answer to the petition of the petitioner alleges and shows unto the Court as follows:

I.

That it has not sufficient knowledge or information to form a belief as to the matters and things alleged in Paragraphs numbered I, II, and III of said petition either to admit or deny the same, and therefore leaves the petitioner to its proof thereof, except as to the matters hereunder alleged and set forth. [41]

II.

That this defendant is informed and believes that John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, are the owners in fee simple of that certain parcel of land referred to in said petition designated as Lot C-1 containing an area of 2.249 acres, as shown by the Map or Plat thereof attached to said petition; that by Indenture of Lease dated September 12, 1940 said Trustees did lease and demise said Lot C-1 to this defendant for the term of thirty (30) years beginning with the 1st day of July, 1940, which said Indenture of

Lease this defendant asks leave to introduce upon the hearing of this cause; that the leasehold interest created in and by the terms of said Indenture of Lease is of great value to this defendant, and defendant cannot adequately be compensated for the taking thereof by the payment of money; that said leasehold is used and is intended to be used in connection with the operation of the branch of this defendant which is operated on the military reservation of the United States of America at Hickam Field adjoining the area sought to be condemned, under a license issued by the Secretary of War dated May 9, 1940; that this defendant has offered and does hereby offer to relinquish and quitclaim without compensation unto the petitioner in case the property shall be condemned in accordance with the petition all of its right and interest under said Indenture of Lease on condition that petitioner concurrently therewith grants to this defendant and to persons desiring access to said [42] branch of this defendant an easement for right of way and for parking purposes covering the area described in said Indenture of Lease or such other area as may mutually be agreed upon for the same purposes, said easement to continue during the existence of the license referred to above granted by the Secretary of War to this defendant, or any extension, renewal, or substitution thereof.

Wherefore this defendant prays that in case said property shall be condemned and taken as prayed

for in and by said petition, and in case the United States of America shall neglect or refuse to accept the offer of this defendant and grant to it an easement as hereinabove provided in form satisfactory to the petitioner and this defendant, then the value of this defendant's interest in said leasehold should be determined and the compensation therefor ordered to be paid to this defendant.

Dated: Honolulu, T. H., December 30, 1940.

BISHOP NATIONAL BANK OF HAWAII AT HONOLULU
By SMITH, WILD, BEEBE & CADES
By(s) J. RUSSELL CADES
Its Attorneys

(Acknowledgment of Service)

[Endorsed]: Filed Dec. 30, 1940. [43]

[Title of District Court and Cause—Civil No. 434.]

MOTION FOR ORDER OF PAYMENT OF DEPOSIT

Now come John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, and respectfully move this Honorable Court to enter an order directing the Clerk of Court to distribute the sum of $33,498.00, now on deposit in said Court, to these defendants.

This motion is based upon the record in the above entitled cause.

Dated: Honolulu, T.H., April 8, 1941.

JOHN WATERHOUSE,
ERNEST HAY WODEHOUSE,
WALTER FRANCIS FREAR and
JOHN EDWARD RUSSELL,
Trustees as aforesaid,
By ROBERTSON, CASTLE & ANTHONY
By (s) A. G. M. ROBERTSON
their attorneys [59]

NOTICE

To: John E. Parks, Assistant U. S. Attorney, District of Hawaii,
Honolulu Plantation Company, and Stanley, Vitousek, Pratt & Winn, its attorneys, and
Bishop National Bank of Hawaii at Honolulu, and Smith, Wild, Beebe & Cades, its attorneys:

Please take notice that the foregoing motion will be presented to the Court, Honorable Delbert E. Metzger, presiding judge, on Thursday, April 10, 1941, at 10 o'clock, a.m., or as soon thereafter as counsel can be heard.

ROBERTSON, CASTLE & ANTHONY
By (s) A. G. M. ROBERTSON
Attorneys for Movants

Receipt of a copy acknowledged this 8th day of April, 1941.

STANLEY, VITOUSEK, PRATT & WINN (H.H.M.)
SMITH, WILD, BEEBE & CADES (D.G.R.)
JOHN J. COURTNEY

[Endorsed]: Filed Apr. 8, 1941. [60]

[Title of District Court and Cause—Civil No. 434.]

ORDER FOR DISTRIBUTION OF MONEY DEPOSITED

[61]

The motion of the Trustees of the Estate of Samuel M. Damon, deceased, defendants in the above entitled cause, filed in said cause on April 8, 1941, having come on for hearing, and no opposition to the granting of said motion being made,

It is hereby ordered that the Clerk of this Court forthwith draw a check for the money on deposit in the registry of this court in said cause, to be signed by the Judge and the Clerk, viz:

John Waterhouse, Ernest H. Wodehouse, Walter F. Frear and John E. Russell, Trustees Estate Samuel M. Damon, deceased $33,498.00

[62]

It is further ordered that said payment shall be made without prejudice to the defendants, Honolulu Plantation Company, and the said Trustees of the Estate of Samuel M. Damon, deceased, to claim additional compensation and/or damages in said cause in excess of the amount aforesaid.

Dated: Honolulu, T.H., April 15th, 1941.

(s) D. E. METZGER
Judge of the above entitled Court

Attest:

.....
Clerk

Approved:

STANLEY, VITOUSEK, PRATT & WINN
Attorneys for Honolulu Plantation Company
By RAV

[Endorsed]: Filed Apr. 15, 1941. [63]

[Title of District Court and Cause—Civil No. 434.]

MOTION FOR A DIRECT VERDICT

Comes now The United States of America and at the close of all of the testimony in this cause moves that the Court instruct the jury to return a verdict in favor of the defendants for the sum of Thirty-three Thousand Four Hundred Eighty-nine Dollars ($33,489.00), as and for the fair cash mar-

ket value of the lands condemned, exclusive of growing crops or improvements thereon.

Dated at Honolulu, T.H., this 29th day of July, 1941.

THE UNITED STATES OF AMERICA
By (s) JOHN J. COURTNEY
Special Assistant to the Attorney General

The above entitled Motion is overruled.

(s) D. E. METZGER
Judge,
United States District Court
for the District of Hawaii

Dated at Honolulu, T.H. this 29th day of July, 1941.

[Endorsed]: Filed Jul. 29, 1941. [67]

[Title of District Court and Cause—Civil No. 434.]

VERDICT

We the Jury in the above entitled cause, find the fair market value of the lands condemned herein, exclusive of crops and improvements, to be in the sum of $61,830.40.

Dated at Honolulu, T.H., this 31st day of July, 1941.

(s) DAVID L. OLESON
Foreman

[Endorsed]: Filed Jul. 31, 1941. [69]

[Title of District Court and Cause—Civil No. 434.]

ORDER FOR JUDGMENT

This cause having duly come on for hearing before this Court and a Jury for the determination of the fair market value of the lands condemned herein, exclusive of crops and improvements thereon, and said cause having been tried by the Court and submitted to the Jury and the verdict of said Jury having been entered herein on July 31, 1941, assessing the fair market value of the lands condemned as aforesaid, exclusive of crops and improvements thereon, in the sum of $61,830.40 and,

It appearing that there was heretofore deposited in this cause the sum of $33,498.00 as the estimated compensation for the lands condemned, which said sum was duly disbursed to John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, et al., on April 15, 1941, and due receipt given therefor, and

In pursuance of the provisions of the Statute in such case made and provided, the Defendants aforesaid are entitled to a Judgment [71] against the United States of America for the difference between the amount of said deposit and the amount assessed by the Jury in the verdict aforesaid, that is to say the sum of $28,332.40.

Therefore, on Motion of the Respondents and of the United States of America, it is ordered, and the

Clerk be and hereby is directed to enter a Judgment against the United States of America, assessing the fair market value of the lands condemned herein, exclusive of crops and improvements thereon, as the sum of $61,830.40, and the sum of $33,498.00, having heretofore been deposited and paid, is credited thereon, and the balance of said sum, to-wit: $28,332.40 shall bear interest at the rate of 6% from November 20, 1940.

Let Judgment be entered accordingly.

Dated at Honolulu, T.H., this 18th day of August, 1941.

(s) D. E. METZGER
Judge of the United States District Court for the Territory of Hawaii

Approved:
ROBERTSON, CASTLE & ANTHONY
Attys. for Trustees Estate S. M. Damon

[Endorsed]: Filed Aug. 18, 1941. [72]

[Title of District Court and Cause—Civil No. 434.]

JUDGMENT

Pursuant to the order for judgment made and entered in the above entitled cause on August 18, 1941, by the Honorable D. E. Metzger, United States District Judge,

It is hereby ordered, adjudged and decreed that the fair market value of the lands described in the petition and condemned herein, exclusive of crops and improvements, is determined to be the sum of $61,830.40, and

It is further ordered, adjudged and decreed that John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear, and John Edward Russell, trustees under the will and of the estate of Samuel M. Damon, deceased, defendants herein, do have and recover of the United States of America, petitioner herein, the difference between said sum of $61,830.40 and the sum of $33,498.00 heretofore deposited herein and paid [74] to said defendants, or the sum of $28,332.40, together with interest thereon at the rate of six per cent (6%) per annum from November 20, 1940, and

It is further ordered, adjudged and decreed that this judgment be and it is hereby entered nunc pro tunc as of August 18, 1941.

Dated: Honolulu, Hawaii, November 15, 1941.

(Seal) (s) WM. F. THOMPSON, JR.
Clerk of the United States District Court for the Territory of Hawaii

The foregoing judgment is hereby approved.

(s) D. E. METZGER
United States District Judge

[Endorsed]: Filed Nov. 15, 1941. [75]

[Title of District Court and Cause—Civil No. 434.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Final Judgment of this Court entered in this action on August 18th, 1941, determining the fair market value of the lands condemned herein, exclusive of crops and improvements thereon, to be the sum of $61,830.40, upon which sum there had been heretofore deposited the sum of $33,498.00 under the Declaration of Taking, the deficiency thereon, to-wit: the sum of $28,332.40, bearing interest at the rate of 6% from November 20, 1940.

Dated at Honolulu, T.H., this 15th day of November, 1941.

UNITED STATES OF AMERICA,
Petitioner,
By (s) NORMAN M. LITTELL,
Assistant Attorney General

NORMAN M. LITTELL,
By (s) JOHN J. COURTNEY
Special Assistant to the
Attorney General

JOHN J. COURTNEY

[Endorsed]: Filed Nov. 15, 1941. [78]

[Title of District Court and Cause—Civil No. 434.]

ORDER ENLARGING TIME

On Motion of the United States of America and for good cause shown, it is

Ordered that the time for filing the record and docketing the action in this cause in the United States Circuit Court of Appeals for the Ninth Circuit be and it is hereby extended for the full period of ninety (90) days from November 15th, 1941, the date of the filing of the notice of appeal herein.

Dated at Honolulu, T.H., this 15th day of November, 1941.

(s) D. E. METZGER
Judge,
United States District Court
for the Territory of Hawaii

[Endorsed]: Filed Nov. 15, 1941. [80]

[Title of District Court and Cause—Civil No. 434.]

ORDER ENLARGING TIME FOR SERVING AND FILING THE DESIGNATION OF RECORD ON APPEAL

On Motion of the United States of America and for good cause shown, it is

Ordered that the time for serving and filing the designation of the portions of the record, proceedings and evidence to be contained in the record on

appeal in this cause in the United States Circuit Court of Appeals for the Ninth Circuit be and it is hereby extended for the full period of ninety (90) days from November 15, 1941, the date of the filing of the notice of appeal herein.

Dated at Honolulu, T.H., this 15th day of November, 1941.

(s) D. E. METZGER
Judge,
United States District Court
for the Territory of Hawaii

[Endorsed]: Filed Nov. 15, 1941. [82]

In the United States District Court
for the Territory of Hawaii

October Term 1940

Civil No. 436

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

254.468 acres of land, more or less, in Moanalua, Honolulu, Island of Oahu, Territory of Hawaii, JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR and JOHN EDWARD RUSSELL, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, HONOLULU PLANTATION COMPANY, BISHOP NATIONAL BANK OF HAWAII AT HONOLULU, TERRITORY OF HAWAII, CITY AND COUNTY OF HONOLULU, JOHN DOE ONE TO JOHN DOE FIFTY, INCLUSIVE, and MARY ROE ONE TO MARY ROE FIFTY, INCLUSIVE, unknown owners and claimants,
Defendants.

PETITION FOR CONDEMNATION

[83]

To the Honorable, the Presiding Judge of the United States District Court for the Territory of Hawaii:

The petition of the United States of America brought by Angus M. Taylor, Jr., Acting United

States Attorney for the District of Hawaii, acting under the instructions of the Attorney General and at the request of the Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy, respectfully shows as follows:

I.

That pursuant to the provisions of an Act of Congress approved June 28, 1940 (54 Stat. 676) and an Act of Congress [84] approved September 9, 1940 (54 Stat. Chap. 717), the Secretary of the Navy is authorized and directed to acquire the hereinafter described land for the establishment of necessary housing at Moanalua, Honolulu, Island of Oahu, Territory of Hawaii, as may in his discretion and judgment be necessary for the establishment of necessary housing for naval personnel engaged in national defense activities, which in his discretion he may deem advisable, and that the Congress of the United States of America has duly appropriated and made available funds for the acquisition of said land and the establishment of this site to be utilized for the establishment of necessary housing for navy personnel engaged in national defense activities.

II.

That pursuant to and in conformity with said authority the Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy, has duly selected for acquisition by the United States of America the lands hereinafter described for the

establishment of necessary housing for naval personnel engaged in national defense activities, and that said lands are necessary, in his opinion, for the purpose of utilizing the same as and for a site for the establishment of necessary housing for naval personnel engaged in national defense activities.

III.

That pursuant to the provisions of the Act of Congress approved August 1, 1888 (25 Stat. 357; United States Code, Title 40, Section 257) and the Act of Congress approved February 26, 1931 (46 Stat. 1421; United States Code, Title 40, Section 258(a)) and supplementary and amendatory acts, the Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy, has determined and is of the opinion that it is useful, proper, necessary, advantageous and to the interests of the United States of America to acquire title to the lands hereinafter described by [85] condemnation under judicial process, and has made application to the Attorney General of the United States to cause such proceedings to be commenced, in pursuance of which application the Attorney General has instructed and directed the United States Attorney for the District of Hawaii to institute this proceeding.

IV.

The United States of America institutes this proceeding to acquire certain lands at a fair, reasonable and just compensation.

V.

That the land which it is necessary for the United States to acquire for the purpose hereinbefore set forth *set forth* is situated at Moanalua, Honolulu, Island of Oahu, Territory of Hawaii, contains an aggregate of two hundred fifty-four and four hundred sixty eight thousands (254.468) acres of land, more or less, all as set forth upon the maps attached hereto and made a part of this Petition and marked Exhibits "A", "B", and "C", respectively.

That the land is more fully described as follows:

Lot D Being Lot D, Subdivision of R. P. 7858, Land Court Application 1074 (Amended) of the S. M. Damon Trust Estate, situate at Moanalua, Honolulu, Oahu, Territory of Hawaii.

Beginning at a point on the North boundary of the 40.0 foot Oahu Railway and Land Co.'s right of way the coordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 8031.90 feet South and 8274.24 feet West and running by true azimuths measured clockwise from South:

116° 10′ 30″ 2735.51 feet along the North boundary of the Oahu Railway and Land Co.'s right of way.

226° 59′ 00″ 2257.76 feet along the East boundary of Land Court Application 966 (Amended) at Halawa, Ewa, Oahu, T. H. [86]

348° 25′ 00″ 1713.26 feet along the West boundary of the 80.0 foot Kamehameha Highway to a point; thence to the left on a curve with a radius of 1950.08 feet, the azimuth and length of the chord being;

331° 47′ 47″ 1115.55 feet to a point on the curve, thence

26° 10′ 30″ 46.26 feet

46° 42′ 30″ 64.07 feet to the point of beginning and containing an area of 61.512 acres. This excludes that portion of the original Lot D acquired by the Territory of Hawaii at the intersection of Kamehameha Highway and Dillingham Boulevard.

Together With All Improvements Thereon.

Lot C-3-A Being a portion of Lot C-3 of Land Court Application 1074, situated at Moanalua, Honolulu, Oahu, T. H.

Beginning at the Northwest corner of this parcel of land, being also the Northeast corner of Lot C-2, on the South side of Dillingham Boulevard from which point a Territorial Highway Monument at the Northwest corner of Lot C-1, being the original Northwest corner of Lot C is by true azimuth 116° 10′ 30″ 1293.00 feet, and thence running by azimuths measured clockwise from true south;

296° 10′ 30″ 1054.00 feet along the South side of Dillingham Boulevard.

26° 10′ 30″ 2085.04 feet along Lot C-3-B;

118° 14′ 30″ 1054.82 feet along Hickam Field (U. S. Military Reservation);

206° 10′ 30″ 2047.09 feet along Lot C-2 to the point of beginning and containing an area of 50.0 acres.

Together With All Improvements Thereon. [87]

Lot C-3-B-1 Being a portion of Lot C-3-B of Land Court Application 1074 situated at Moanalua, Honolulu, Oahu, T. H.

Beginning at the Northwest corner of this parcel of land, being also the Northeast corner of Lot C-3-A, on the South side of Dillingham Boulevard from which point a Territorial

Highway Monument at the Northwest corner of Lot C-1, being the original Northwest corner of Lot C is by true azimuth 116° 10′ 30″ 2347.20 feet, and thence running by azimuths measured clockwise from true South:

296° 10′ 30″ 500.00 feet along the South side of Dillingham Boulevard;

26° 10′ 30″ 2102.88 feet along Lot C-3-B-2;

Thence on a curve to the right with a radius of 1008.60 feet, the direct azimuth and distance being 117° 40′ 28″ 19.99 feet;

118° 14′ 30″ 480.33 feet along Hickam Field (U. S. Military Reservation);

206° 10′ 30″ 2085.04 feet along Lot C-3-A to the point of beginning and containing an area of 24.036 acres.

Together With All Improvements Thereon.

Lot C-3-B-2-A Being a portion of Lot C-3-B-2 of Land Court Application 1074 situated at Moanalua, Honolulu, Oahu, T. H.

Beginning at the Northwest corner of this parcel of land, being also the Northeast corner of Lot C-3-B-1, on the South side of Dillingham Boulevard from which point a Territorial Highway Monument at the Northwest corner of

Lot C-1, being the original Northwest corner of Lot C is by true azimuth 116° 10′ 30″ 2847.20 feet, and thence running by azimuths measured clockwise from true South:

296° 10′ 30″ 55.74 feet along the South side of Dillingham Boulevard;

266° 10′ 30″ 20.00 feet along the South side of Dillingham Boulevard;

296° 10′ 30″ 1215.80 feet along the South side of Dillingham Boulevard;

Thence on a curve to the left with a radius of 2935 feet, the [88] direct azimuth and distance being 287° 36′ 55″ 873.69 feet;

279° 03′ 20″ 618.19 feet along the South side of Dillingham Boulevard;

9° 03′ 20″ 1469.00 feet along Lot C-3-B-2-B;

97° 20′ 2994.38 feet along Hickam Field (U. S. Military Reservation);

Thence on a curve to the right with a radius of 1008.60 feet, the direct azimuth and distance being 107° 13′ 11″ 346.34 feet;

206° 10′ 30″ 2102.88 feet along Lot C-3-B-1 to the point of beginnnig and containing an area of 118.92 acres.

Together With All Improvements Thereon

VI.

That the estate to be taken for said public uses and purposes is the full fee simple title, absolute thereto.

VII.

That the information acquired by this petitioner indicates that the following persons are the purported owners of or may have some interest in the lands which are part and are contained in the interior boundaries of the above described areas:

John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased,

Honolulu Plantation Company,

Bishop National Bank of Hawaii at Honolulu,

Territory of Hawaii,

City and County of Honolulu,

John Doe One to John Doe Fifty, inclusive, and

Mary Roe One to Mary Roe Fifty, inclusive, unknown owners and claimants,

whom are hereby made parties defendants to the end that they may come into this Court and by

proper pleadings establish their claims [89] if any.

And in this behalf the Petitioner further avers and shows that John Doe One to John Doe Fifty, inclusive, and Mary Roe one to Mary Roe Fifty, inclusive, named herein as defendants, are fictitious names and represent owners and claimants of interests in said property, the true names of whom are unknown to Petitioner and are therefore made parties to this action by the name and description as aforesaid.

The above named defendants generally and all and singular the heirs, husbands, wives, devisees, executors, administrators, representatives, alienees, successors, assigns of each and every of the above named persons, and all unknown owners, lienors, and claimants having or claiming any right, title, estate, equity, interest or lien; and all occupants, lessees, licensees of and users and holders of said land and all owners or claimants to easements in, on, over, across or through said land; and all persons, companies, and corporations claiming any title or interest to or in the whole or any part of any of said tracts of land; are hereby made parties defendant to the end that they may come into Court and by proper pleadings make claim to said lands, or to the proceedings arising therefrom.

Wherefore, petitioner prays that this Honorable Court will take jurisdiction of this cause and will make and have entered all orders, judgments and decrees necessary to bring all of the owners of the

said land before this Court and will make all unknown parties having interest therein parties defendants hereto, and will proceed to fix the value of said lands according to the law in such instances applicable and the amount of compensation to which the owners thereof are entitled for such appropriation and made and have entered all such further orders, judgments and decrees as may be necessary to vest the entire and unencumbered fee thereof in the United [90] States of America, and to make just distribution of the final awards among those entitled thereto as expeditiously as possible.

THE UNITED STATES OF AMERICA,
Petitioner,
By ANGUS M. TAYLOR, JR.,
Acting United States Attorney,
District of Hawaii
By (s) JOHN E. PARKS,
JOHN E. PARKS,
Assistant United States Attorney,
District of Hawaii

The United States of America,
District of Hawaii—ss.

John E. Parks, being first duly sworn on oath, deposes and says:

That he is Assistant United States Attorney for the District of Hawaii; that he has read the foregoing Petition for Condemnation and knows the

contents thereof and that the same is true to the best of his knowledge, information and belief.

(sgd) JOHN E. PARKS

Subscribed and sworn to before me this 27th day of November, 1940.

(Seal) (s) WM. F. THOMPSON, JR.
Clerk,
United States District Court
for the Territory of Hawaii

[Endorsed]: Filed Nov. 27, 1940. [91]

[Title of District Court and Cause—Civil No. 436.]

DECLARATION OF TAKING

Whereas, it has become necessary that the lands which are the subject of condemnation in the above entitled proceeding be taken for immediate public use by the United States of America for the establishment of necessary housing in Moanalua, Honolulu, Oahu, Territory of Hawaii, for naval personnel engaged in national defense activities, upon the filing of this declaration of taking.

Now, therefore, I, James Forrestal, Acting Secretary of the Navy, acting for and in the capacity of the Secretary of the Navy, under and pursuant to the provisions of the Acts of Congress approved June 28, 1940 (54 Stat., 676); September [99] 9, 1940 (54 Stat., Chap. 717), and February 26, 1932 (46 Stat., 1421; U. S. C., title 40, sec. 258a), do hereby make and cause to be filed this declaration of taking, pursuant to said acts of Congress and any acts amendatory thereof or supplementary thereto, and by virtue and authority thereof, do hereby state that I have selected for acquisition four parcels of land, with all improvements thereon, situated at Moanalua, Honolulu, Oahu, Territory of Hawaii, containing an aggregate of two hundred fifty-four and four hundred sixty-eight thousandths (254.468) acres, more or less, which said parcels are known as Lot D, Lot C-3-A, Lot C-3-B-1, and Lot C-3-B-2-A. Lot D, and Lot C-3-A are shown on 14th N. D. Drawing No. OA-N1-261 of "Moanalua, Honolulu,

Oahu, T.H., S. M. Damon Trust Estate," approved October 18, 1940, Lot C-3-B-1 is shown on 14th N. D. Drawing No. OA-N1-264 of "Moanalua, Honolulu, Oahu, T.H., S. M. Damon Trust Estate," approved October 25, 1940, and Lot C-3-B-2-A is shown on 14th N. D. Drawing No. OA-N1-265 of "Moanalua, Honolulu, Oahu, T.H., S. M. Damon Trust Estate," approved October 29, 1940, photostatic copies of each of said drawings being hereto attached as Exhibits "A", "B", and "C" respectively and made a part of this declaration of taking. Said respective parcels of land are more particularly described as follows:

Lot D Being Lot D, Subdivision of R. P. 7858, Land Court Application 1074 (Amended) of the S. M. Damon Trust Estate, situate at Moanalua, Honolulu, Oahu, T. H. [100]

Beginning at a point on the North boundary of the 40.0 foot Oahu Railway and Land Co.'s right of way the coordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 8031.90 feet South and 8274.24 feet West and running by true azimuths measured clockwise from South:

116° 10′ 30″ 2735.51 feet along the North boundary of the Oahu Railway and Land Co.'s right of way.

226° 59′ 00″ 2257.76 feet along the East boundary of Land Court Application 966 (Amended) at Halawa, Ewa, Oahu, T. H.

348° 25′ 00″ 1713.26 feet along the West boundary of the 80.0 foot Kamehameha Highway to a point; thence to the left on a curve with a radius of 1950.08 feet, the azimuth and length of the chord being;

331° 47′ 47″ 1115.55 feet to a point on the curve, thence

26° 10′ 30″ 46.26 feet

46° 42′ 30″ 64.07 feet to the point of beginning and containing an area of 61.512 acres. This excludes that portion of the original Lot D acquired by the Territory of Hawaii at the intersection of Kamehameha Highway and Dillingham Boulevard.

Lot C-3-A Being a portion of Lot C-3 of Land Court Application 1074, situated at Moanalua, Honolulu, Oahu, T. H.

Beginning at the Northwest corner of this par- [101]
cel of land, being also the Northeast corner of Lot C-2, on the South side of Dillingham Boulevard from which point a Territorial Highway Monument at the Northwest corner of Lot C-1, being the original Northwest corner of Lot C is by true azimuth 116° 10′ 30″ 1293.00 feet, and thence running by azimuths measured clockwise from true south;

296° 10′ 30″ 1054.00 feet along the South side of Dillingham Boulevard.

26° 10′ 30″ 2085.04 feet along Lot C-3-B;

118° 14′ 30″ 1054.82 feet along Hickam Field (U. S. Military Reservation);

206° 10′ 30″ 2047.00 feet along Lot C-2 to the point of beginning and containing an area of 50.0 acres.

Lot C-3-B-1 Being a portion of Lot C-3-B of Land Court Application 1074 situated at Moanalua, Honolulu, Oahu, T. H.

Beginning at the Northwest corner of this parcel of land, being also the Northeast corner of Lot C-3-A, on the South side of Dillingham

Boulevard from which point a Territorial Highway Monument at the Northwest corner of Lot C-1, being the original Northwest corner of Lot C is by true azimuth 116° 10′ 30″ 2347.20 feet, and thence running by azimuths measured clockwise from true South:

296° 10′ 30″ 500.00 feet along the South side of Dillingham Boulevard;

26° 10′ 30″ 2102.88 feet along Lot C-3-B-2;

Thence on a curve to the right with a radius of 1008.60 feet, the direct azimuth and distance being 117° 40′ 28″ 19.99 feet;

118° 14′ 30″ 480.33 feet along Hickam Field (U. S. Military Reservation);

206° 10′ 30″ 2085.04 feet along Lot C-3-A to the point of beginning and containing an area of 24.036 acres. [102]

Lot C-3-B-2-A Being a portion of Lot C-3-B-2 of Land Court Application 1074 situated at Moanalua, Honolulu, Oahu, T. H.

Beginning at the Northwest corner of this parcel of land, being also the Northeast corner of Lot C-3-B-1, on the South side of Dillingham Boulevard from which point a Territorial Highway Monument at the Northwest corner of

Lot C-1, being the original Northwest corner of Lot C is by true azimuth 116° 10′ 30″ 2847.20 feet, and thence running by azimuths measured clockwise from true South:

296° 10′ 30″ 55.74 feet along the South side of Dillingham Boulevard;

266° 10′ 30″ 20.00 feet along the South side of Dillingham Boulevard;

296° 10′ 30″ 1215.80 feet along the South side of Dillingham Boulevard;

Thence on a curve to the left with a radius of 2935 feet, the direct azimuth and distance being 287° 36′ 55″ 873.69 feet;

279° 03′ 20″ 618.19 feet along the South side of Dillingham Boulevard;

9° 03′ 20″ 1469.00 feet along Lot C-3-B-2-B;

97° 20′ 2994.38 feet along Hickam Field (U. S. Military Reservation);

Thence on a curve to the right with a radius of 1008.60 feet, the direct azimuth and distance being 107° 13′ 11″ 346.34 feet;

206° 10′ 30″ 2102.88 feet along Lot C-3-B-1 to the point of beginnnig and containing an area of 118.92 acres. [103]

And I do declare said lands to be taken under authority of the aforesaid acts of Congress; that the use for which said lands are to be put is the same as authorized by said acts; and that the estate hereby taken in said lands for the public use aforesaid is in fee simple subject to existing public utility easements, if any.

And I, James Forrestal, Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy, do hereby state that the sum of money estimated by me to be just compensation for all of said lands, improvements thereon and appurtenances thereunto belonging is one hundred twenty-three thousand eight hundred seventy-one dollars and ninety-four cents ($123,871.94), which said sum having been appropriated by Congress is hereby deposited into the registry of this court for the use and benefit of the persons entitled thereto, and that the names and addresses of the owners of said property or interests therein and the amounts of just compensation for each of the respective parcels, and improvements threon, which are hereby taken are shown on Schedule "A" which is hereto attached and made a part of this declaration of taking. I am of the opinion that the ultimate award for the

taking of said land will be within the limits prescribed by Congress on the price to be paid.

In Witness Whereof, the petitioner, by and through the said James Forrestal, Acting Secretary of the Navy, [104] acting for and in behalf of the Secretary of the Navy, has caused this declaration of taking to be signed in its name and has caused the seal of the Navy Department to be affixed hereto on this 19th day of November, 1940, in the City of Washington, District of Columbia.

UNITED STATES OF AMERICA

[Seal] By (S) JAMES FORRESTAL

Acting Secretary of the Navy [105]

SCHEDULE "A"

The owners of each of the lots or parcels of land taken by the within declaration of taking, to wit: Lot D, Lot C-3-A, Lot C-3-B-1, and Lot C-3-B-2-A are:

John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear, and John Edward Russell, Trustees under the will of Samuel Mills Damon, deceased, their address being Honolulu, Hawaii.

Each of said lots is under a lease to the Honolulu Plantation Company, whose address is Honolulu, Hawaii.

The respective amounts hereby deposited into Court as fair compensation for each of said lots, including growing crops and improvements thereon, are as follows:

Lot D		
Land, 61.512 acres @ $430.00 per acre		$ 26,450.16
Improvements (Irrigation ditches)		600.00
Cane ratoons		2,865.90
		$ 29,916.06
Lot C-3-A		
Land, 50 acres @ $430.00 per acre		$ 21,500.00
Improvements (Irrigation ditches)		800.00
Cane ratoons		1,254.00
		$ 23,554.00
Lot C-3-B-1		
Land, 24.036 acres @ $430.00 per acre		$ 10,335.48
Improvements (Irrigation ditches)		480.00
Cane ratoons		1,680.00
		$ 12,495.48
Lot C-3-B-2-A		
Land, 118.92 acres @ $420.00 per acre		$ 49,946.40
Improvements (Irrigation ditches)		1,000.00
Cane ratoons		6,960.00
		$ 57,906.40
Total		$123,871.94

[Endorsed]: Filed Nov. 27, 1940. [106]

[Title of District Court and Cause—Civil No. 436.]

ORDER AND JUDGMENT ON DECLARATION OF TAKING

It appearing to this Court that on the 27th day of November, 1940, the United States of America filed herein a Petition for Condemnation of certain lands hereinafter described and that together therewith was filed a declaration of taking signed by James Forrestal, Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy, under and by virtue of the provisions of the Act of Congress approved June 28, 1940 (54 Stat. 676) and the Act of Congress approved September 9, 1940 (54 Stat. Chap. 717) and pursuant to the provisions of the Act of Congress approved August 1, 1888 (25 Stat. 357) and the Act of Congress approved February 26, 1931 (46 Stat. 1421) and therein setting [113] forth the taking of the fee simple title to said lands and that the uses of the lands acquired are as described in said acts of authority; and further setting forth the ascertaining of just compensation for said lands to be deposited into the Registry of this Court to the use of the persons entitled thereto in the amount of the estimated compensation for the purchase of said lands;

Whereas, it further appears that there has been paid into the Registry of this Court the sum of One Hundred Twenty Three Thousand Eight Hundred Seventy One Dollars and Ninety Four Cents ($123,871.94), with schedules designating the funds as the estimated just compensation for the taking

of said lands, said lands being described as follows:

Lot D Being Lot D, Subdivision of R. P. 7858, Land Court Application 1074 (Amended) of the S. M. Damon Trust Estate, situate at Moanalua, Honolulu, Oahu, T. H.

Beginning at a point on the North boundary of the 40.0 foot Oahu Railway and Land Co.'s right of way the coordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 8031.90 feet South and 8274.24 feet West and running by true azimuths measured clockwise from South:

116° 10′ 30″ 2735.51 feet along the North boundary of the Oahu Railway and Land Co.'s right of way.

226° 59′ 00″ 2257.76 feet along the East boundary of Land Court Application 966 (Amended) at Halawa, Ewa, Oahu, T. H.

348° 25′ 00″ 1713.26 feet along the West boundary of the 80.0 foot Kamehameha Highway to a point; thence to the left on a curve with a radius of 1950.08 feet, the azimuth and length of the chord being;

331° 47′ 47″ 1115.55 feet to a point on the curve, thence [114]

26° 10′ 30″ 46.26 feet

46° 42′ 30″ 64.07 feet to the point of beginning and containing an area of 61.512 acres. This excludes that portion of the original Lot D acquired by the Territory of Hawaii at the intersection of Kamehameha Highway and Dillingham Boulevard.

Together With All Improvements Thereon.

Lot C-3-A. Being a portion of Lot C-3 of Land Court Application 1074, situated at Moanalua, Honolulu, Oahu, Territory of Hawaii.

Beginning at the Northwest corner of this parcel of land, being also the Northeast corner of Lot C-2, on the South side of Dillingham Boulevard from which point a Territorial Highway Monument at the Northwest corner of Lot C-1, being the original Northwest corner of Lot C is by true azimuth 116° 10′ 30″ 1293.00 feet, and thence running by azimuths measured clockwise from true south:

296° 10′ 30″ 1054.00 feet along the South side of Dillingham Boulevard.

26° 10′ 30″ 2085.04 feet along Lot C-3-B;
118° 14′ 30″ 1054.82 feet along Hickam Field (U. S. Military Reservation);
206° 10′ 30″ 2047.00 feet along Lot C-2 to the point of beginning and containing an area of 50.0 acres.

Together With All Improvements Thereon

Lot C-3-B-1 Being a portion of Lot C-3-B of Land Court Application 1074 situated at Moanalua, Honolulu, Oahu, T. H.

Beginning at the Northwest corner of this parcel of land, being also the Northeast corner of Lot C-3-A, on the South side of Dillingham Boulevard from which point a Territorial Highway Monument at the Northwest corner of Lot C-1, being the original Northwest corner of Lot C is by true azimuth 116° 10′ 30″ 2347.20 feet, and thence running by azimuths measured clockwise from true South:

296° 10′ 30″ 500.00 feet along the South side of Dillingham Boulevard;
26° 10′ 30″ 2102.88 feet along Lot C-3-B-2;

[115]

Thence on a curve to the right with a radius of 1008.60 feet, the direct azimuth and distance being 117° 40′ 28″ 19.99 feet;

118° 14′ 30″ 480.33 feet along Hickam Field (U. S. Military Reservation);

206° 10′ 30″ 2085.04 feet along Lot C-3-A to the point of beginning and containing an area of 24.036 acres.

Together With All Improvements Thereon.

Lot C-3-B-2-A Being a portion of Lot C-3-B-2 of Land Court Application 1074 situated at Moanalua, Honolulu, Oahu, T. H.

Beginning at the Northwest corner of this parcel of land, being also the Northeast corner of Lot C-3-B-1, on the South side of Dillingham Boulevard from which point a Territorial Highway Monument at the Northwest corner of Lot C-1, being the original Northwest corner of Lot C is by true azimuth 116° 10′ 30″ 2847.20 feet, and thence running by azimuths measured clockwise from true South:

296° 10′ 30″ 55.74 feet along the South side of Dillingham Boulevard;

266° 10′ 30″ 20.00 feet along the South side of Dillingham Boulevard;

296° 10′ 30″ 1215.80 feet along the South side of Dillingham Boulevard;

Thence on a curve to the left with a radius of 2935 feet, the direct azimuth and distance being 287° 36′ 55″ 873.69 feet;		
279° 03′ 20″	618.19 feet	along the South side of Dillingham Boulevard;
9° 03′ 20″	1469.00 feet	along Lot C-3-B-2-B;
97° 20′	2994.38 feet	along Hickam Field (U. S. Military Reservation);
Thence on a curve to the right with a radius of 1008.60 feet, the direct azimuth and distance being 107° 13′ 11″ 346.34 feet;		
206° 10′ 30″	2102.88 feet	along Lot C-3-B-1 to point of beginning [116] and containing an area of 118.92 acres.

Together With All Improvements Thereon

And good cause appearing,

It is hereby Ordered and Adjudged that the title to the lands hereinabove described is indefeasibly vested in the United States of America.

And it is further Ordered and Adjudged That the owners, claimants, and occupants of said lands and every part and parcel thereof forthwith deliver to the petitioner herein, and to its duly authorized

agents, the immediate and exclusive possession of said lands.

And it is further Ordered that a certified copy of this Order with a certificate of the Clerk of this Court showing the payment into the registry of the court of the sum hereinabove set forth, shall be served upon each and every person or persons in possession of said lands.

And it is further Ordered that due and legal service be had upon all of the persons, firms and corporations named as defendants or claimants in the petition on file herein, and all and singular their heirs, husbands, wives, devisees, executors, administrators, representatives, alienees, successors and assigns of each and every named person, firm and corporation, and all unknown owners, lienors and claimants having or claiming any title, estate, equity or lien, and all occupants, lessees, licensees and users and holders and owners of *an* claimants to easements in, on, over, across or through said lands; and all persons, companies and corporations claiming any title to or in any of said tract of land requiring said parties to answer in this cause setting forth any claim, right, title, interest or possession of any kind or nature in [117] and to said described lands.

Dated at Honolulu, Territory of Hawaii, this 27th day of November, 1940.

D. E. METZGER,
Judge.

[Endorsed]: Filed Nov. 27, 1940. [118]

[Title of District Court and Cause—Civil No. 436.]

ANSWER OF THE TRUSTEES UNDER THE WILL OF SAMUEL M. DAMON, DECEASED

Now come John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will of the Estate of Samuel M. Damon, deceased, defendants in the above entitled cause, and answering the petition filed in said cause, allege and show as follows:

I.

That they have not sufficient knowledge or information to form a belief as to the matters and things alleged in paragraphs I, II and III of said petition to [120] either admit or deny the same, and therefore leave the petitioner to its proof thereof.

II.

That these defendants are the owners in fee simple of the property described in paragraph V of said petition, subject only to a leasehold interest held by Honolulu Plantation Company, expiring the 31st day of December 1943.

Wherefore, these defendants pray that in case said property shall be condemned and taken as prayed for in and by said petition, the value thereof and the compensation to be paid therefor may be determined and ordered to be paid to these defendants.

Dated, Honolulu, T. H., December 10, 1940.

JOHN WATERHOUSE,
ERNEST HAY WODEHOUSE,
WALTER FRANCIS FREAR,
and
JOHN EDWARD RUSSELL,
Trustees under the Will and of the Estate of Samuel M. Damon, deceased,
By ROBERTSON CASTLE & ANTHONY,
By (s) A. G. M. ROBERTSON,
their attorneys.

Receipt of a copy acknowledged this 10th day of Dec. 1940.

(s) JOHN E. PARKS
Asst. U. S. Atty.

[Endorsed]: Filed Dec. 10, 1940. [119]

[Title of District Court and Cause—Civil No. 436.]

MOTION FOR ORDER OF PAYMENT OF DEPOSIT

Now come John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, and respectfully move this Honorable Court to enter an order di-

recting the Clerk of Court to distribute the sum of $123,871.94, now on deposit in said Court, to these defendants.

This motion is based upon the record in the above entitled cause.

Dated: Honolulu, T. H., April 8, 1941.

JOHN WATERHOUSE,
ERNEST HAY WODEHOUSE,
WALTER FRANCIS FREAR and
JOHN EDWARD RUSSELL,
Trustees as aforesaid,
By ROBERTSON, CASTLE & ANTHONY,
By (s) A. G. M. ROBERTSON,
their attorneys. [148]

NOTICE

To:

John E. Parks, Assistant U. S. Attorney, District of Hawaii,

Honolulu Plantation Company and Stanley, Vitousek, Pratt & Winn, its attorneys, and

Frank Leialoha Kaleimamahu and Chas. B. Dwight, his attorney:

Please take notice that the foregoing motion will be presented to the Court, Honorable Delbert E. Metzger, presiding Judge, on Thursday, April 10,

1941, at 10 o'clock, a.m., or as soon thereafter as counsel can be heard.

ROBERTSON, CASTLE & ANTHONY
By (s) A. G. M. ROBERTSON
Attorneys for Movants.

Receipt of a copy acknowledged this 8th day of April, 1941.

STANLEY, VITOUSEK, PRATT & WINN (H.M.)
CHARLES B. DWIGHT (S.G.F.)
JOHN J. COURTNEY (s)

[Endorsed]: Filed Apr. 8, 1941. [149]

[Title of District Court and Cause—Civil No. 436.]

ORDER FOR DISTRIBUTION OF MONEY DEPOSITED

The motion of the Trustees of the Estate of Samuel M. Damon, deceased, defendants in the above entitled cause, filed in said cause on April 8, 1941, having come on for hearing, and no opposition to the granting of said motion being made,

It is hereby ordered that the Clerk of this Court forthwith draw a check for the money on deposit in the registry of this Court in said cause, to be signed by the Judge and the Clerk, viz:

John Waterhouse, Ernest H. Wodehouse, Walter F. Frear and John E. Russell, Trustees Es-

tate Samuel M. Damon, deceased.....$123,871.94

[151]

It is further ordered that said payment shall be made without prejudice to the defendants, Honolulu Plantation Company, and the said Trustees of the Estate of Samuel M. Damon, deceased, to claim additional compensation and/or damages in said cause in excess of the amount aforesaid.

Dated: Honolulu, T. H., April 15, 1941.

(S) D. E. METZGER
Judge of the above entitled Court

Attest:

.....
Clerk

Approved:

STANLEY, VITOUSEK, PRATT & WINN
Attorneys for Per RAV
Honolulu Plantation Company

[Endorsed]: Filed Apr. 15, 1941. [152]

[Title of District Court and Cause—Civil No. 436.]

MOTION FOR A DIRECT VERDICT

Comes now The United States of America and at the close of all of the testimony in this cause moves that the Court instruct the jury to return a verdict in favor of the defendants for the sum of One

Hundred and Three Thousand Nine Hundred and Eighty-nine Dollars ($103,989.00), as and for the fair cash market value of the lands condemned, exclusive of growing crops or improvements thereon.

Dated at Honolulu, T. H., this 29th day of July, 1941.

THE UNITED STATES OF AMERICA

By (s) JOHN J. COURTNEY
Special Assistant to the Attorney General

Dated at Honolulu, T. H., this 29th day of July, 1941.

The above entitled Motion is overruled.

(S) D. E. METZGER
Judge,
United States District Court
for the District of Hawaii

[Endorsed]: Filed July 29, 1941. [156]

[Title of District Court and Cause—Civil No. 436.]

VERDICT

We the Jury in the above entitled cause, find the fair market value of the lands condemned herein, exclusive of crops and improvements, to be in the sum of $203,574.40.

Dated at Honolulu, T. H., this 31st day of July, 1941.

(S) DAVID L. OLESON
Foreman

[Endorsed]: Filed July 31, 1941. [158]

[Title of District Court and Cause—Civil No. 436.]

ORDER FOR JUDGMENT

This cause having duly come on for hearing before this Court and a Jury for the determination of the fair market value of the lands condemned herein, exclusive of crops and improvements thereon, and said cause having been tried by the Court and submitted to the Jury and the verdict of said Jury having been entered herein on July 31, 1941, assessing the fair market value of the lands condemned as aforesaid, exclusive of crops and improvements thereon, in the sum of $203,574.40, and,

It appearing that there was heretofore deposited in this cause the sum of $123,871.94, as the estimated compensation for the lands condemned, which said sum was duly disbursed to John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, et al., on April 15, 1941, and due receipt given therefore, and

In pursuance of the provisions of the Statute in

such case made and provided, the Defendants aforesaid are entitled to a Judgment against the United States of America for the difference between the amount of said deposit and the amount assessed by the Jury in the verdict aforesaid, that is to say the sum of $79,702.46. [160]

Therefore, on Motion of the Respondents and of the United States of America, it is ordered, and the Clerk be and hereby is directed to enter a Judgment against the United States of America, assessing the fair market value of the lands condemned herein, exclusive of crops and improvements thereon, as the sum of $203,574.40, and the sum of $123,871.94, having heretofore been deposited and paid, is credited thereon, and the balance of said sum, to-wit: $79,702.46 shall bear interest at the rate of 6% from November 27, 1940.

Let Judgment be entered accordingly.

Dated at Honolulu, T. H., this 18th day of August, 1941.

(S) D. E. METZGER
Judge of the United States District Court for the Territory of Hawaii

Approved:

ROBERTSON, CASTLE & ANTHONY
Attys. for Trustees Estate S. M. Damon

[Endorsed]: Filed Aug. 18, 1941. [161]

[Title of District Court and Cause—Civil No. 436.]

JUDGMENT

Pursuant to the order for judgment made and entered in the above entitled cause on August 18, 1941, by the Honorable D. E. Metzger, United States District Judge,

It is hereby ordered, adjudged and decreed that the fair market value of the lands described in the petition and condemned herein, exclusive of crops and improvements, is determined to be the sum of $203,574.40, and

It is further ordered, adjudged and decreed that John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear, and John Edward Russell, trustees under the will and of the estate of Samuel M. Damon, deceased, defendants herein, do have and recover of the United States of America, petitioner herein, the difference between said sum of $203,574.40 and the sum of $123,871.94 heretofore deposited herein and paid to said defendants, or the sum of $79,702.46, together with interest thereon at the rate of six per cent (6%) per annum [163] from November 27, 1940, and

It is further ordered, adjudged and decreed that this judgment be and it is hereby entered nunc pro tunc as of August 18, 1941.

Dated: Honolulu, Hawaii, November 15, 1941.

(S) WM. F. THOMPSON, JR.
Clerk of the United States District Court for the Territory of Hawaii.

The foregoing judgment is hereby approved.

(S) D. E. METZGER
United States District Judge.

[Endorsed]: Filed Nov. 15, 1941. [164]

[Title of District Court and Cause—Civil No. 436.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Final Judgment of this Court entered in this action on August 18th, 1941, determining the fair market value of the lands condemned herein, exclusive of crops and improvements thereon, to be the sum of $203,574.40, upon which sum there has been heretofore deposited the sum of $123,871.94 under the Declaration of Taking, the deficiency thereon, to wit: the sum of $79,702.46, bearing interest at the rate of 6% from November 27, 1940.

Dated at Honolulu, T.H., this 15th day of November, 1941.

THE UNITED STATES OF AMERICA,
Petitioner

By (s) NORMAN M. LITTELL,
Assistant Attorney General

By (s) JOHN J. COURTNEY,
Special Assistant to the Attorney General

[Endorsed]: Filed Nov. 15, 1941. [179]

[Title of District Court and Cause—Civil No. 436.]

ORDER ENLARGING TIME

On Motion of the United States of America and for good cause shown, it is

Ordered that the time for filing the record and docketing the action in this cause in the United States Circuit Court of Appeals for the Ninth Circuit be and it is hereby extended for the full period of ninety (90) days from November 15th, 1941, the date of the filing of the notice of appeal herein.

Dated at Honolulu, T.H., this 15th day of November, 1941.

(s) D. E. METZGER
Judge,
United States District Court
for the Territory of Hawaii

[Endorsed]: Filed Nov. 15, 1941. [181]

[Title of District Court and Cause—Civil No. 436.]

ORDER ENLARGING TIME FOR SERVING AND FILING THE DESIGNATION OF RECORD ON APPEAL

On Motion of the United States of America and for good cause shown, it is

Ordered that the time for serving and filing the designation of the portions of the record, proceedings and evidence to be contained in the record on

appeal in this cause in the United States Circuit Court of Appeals for the Ninth Circuit be and it is hereby extended for the full period of ninety (90) days from November 15, 1941, the date of the filing of the notice of appeal herein.

Dated at Honolulu, T.H., this 15th day of November, 1941.

(s) D. E. METZGER
Judge,
United States District Court
for the Territory of Hawaii

[Endorsed]: Filed Nov. 15, 1941. [183]

GENERAL INSTRUCTION No. 1

By agreement of the parties, you have been trying two separate cases: one known as Civil No. 434 which is a condemnation by the Federal Works Agency for Army housing facilities of 77.288 acres; the other the condemnation of two parcels of land known as Civil No. 436, one parcel A consisting of 61.512 acres and parcel B consisting of 192.956 acres. These properties adjoin one another and are owned by the same persons. They have, therefore, been tried as one case. But in deciding this case you must render a separate verdict for the property appropriated as Civil No. 434, and another verdict for the property appropriated as Civil 436.

The latter case was condemned at the request of the Navy Department for its use.

This is a taking or a condemnation suit by the United States Government and under the provisions of the Fifth Amendment to the Constitution, the United States is required to pay just compensation for the property appropriated. That is the purpose of your being called upon as jurors to sit in this case to determine what that just compensation is. Just compensation is the fair cash market value of the property at the time of the condemnation. In this instance, one condemnation was commenced on November 20, 1940, the other on November 27, 1940, but the parties have, by agreement in the record, stipulated that the fair market value for both suits should be considered as the fair and reasonable market value as of November, 1940, without relation to the small difference in time.

If in the course of this trial this Court has by word or expression appeared to favor one side or the other, it was not so intended. It is the duty of the Court and the duty of the jury to [184] do absolute, equal and fearless justice to both the land owners and the Government. You are to take the law from the Court and to confine yourselves solely to a consideration of the testimony produced in this case in arriving at a verdict, without limiting your consideration to any isolated portion of such testimony, by considering it as a whole, fairly weighing all of the testimony and all of the evidence. You must not decide this case upon any knowledge which may have come to you by any of the avenues of information which sometimes reach

jurors, nor by any outside comment, suggestion or influence. Such information and conversation, however innocently given, accomplishes a dishonest result and the highest degree of honesty and fearlessness is required of you under your oaths in acting as jurors in any case.

Given as amended [185]

GENERAL INSTRUCTIONS

One of the rights of the sovereign, that is the Government of any nation, is to appropriate the property of individual citizens for the public use of all. In the United States every person holds land subject to condemnations by the Government for public use whenever the necessities of the people shall require them. But in the United States, unlike some other places in the world, under its Constitution, the Government must pay to the person whose property is condemned just compensation therefor.

Just compensation as I have defined it elsewhere in these instructions means the fair and reasonable cash market value of the property at the time of the condemnation, because it is this fair cash market value which is taken from the individual for the use of the people. The United States brings this suit as a Petitioner for the purpose of determining that fair cash market value. But that fact is not to influence you in any way. The Government is entitled to and asks the same consideration from you as any other litigant, neither more nor less. Each person coming into the Court Room as a litigant

is equal in the eyes of the law. But on the other hand the United States must not be penalized because it brings this suit. Nor must it be required to pay a premium over and above the fair cash market value of this property because of the fact that it has condemned land for public use, nor because of any unwillingness on the part of the owner to give up his property for public use. The determination of value which you are to make in this case, is not to be measured by the necessities of the public nor the unwillingness of the owner to part with his property, but is to be determined solely and only by a determination from all the evidence of a fair cash market value as I have defined that term to you.

Given as modified [186]

DEFTS. INSTRUCTION No. 2

You are instructed that the judicial ascertainment of the amount that shall be paid to the owner of private property taken by the government for public use under the power of eminent domain is always a matter of importance, for in any society the fullness and sufficiency of the security which surrounds the owner in the use of his property constitutes one of the most certain tests of the character and value of the government.

When property is taken in this manner the owner becomes entitled to receive the full and exact equivalent of it in money. He is entitled to be put in as good a position pecuniarily as if his property had

not been taken. When he has received a full and fair cash market value of his property he has been put in as good a position pecuniarily as if his property had not been taken.

Given as modified [187]

DEFTS. INSTRUCTION No. 3

The just compensation which the owner is entitled to receive includes all elements of value that inhere in the property, but it does not exceed the market value fairly determined. The amount required to be paid to the owners does not necessarily depend upon the use to which they have devoted the land, but is to be arrived at upon a just consideration of all the uses for which you find the evidence to show the land is suitable. In this connection you may take into consideration any evidence which indicates the best and most profitable use to which the land is adapted and can probably be put in the reasonably near future.

The highest and best use for which the property is adaptable or likely to be needed in the reasonably near future, so far as shown by the evidence in this case, is properly to be considered by you, not necessarily as the exact measure of compensation to be paid for the property, but to the full extent that the prospect of demand for such use affected the market value of the property while held in private ownership in November 1940.

Given as modified [188]

DEFTS. INSTRUCTION No. 4

You are instructed that market value is not to be determined by what the property would bring at a forced sale where the owner was compelled to part with it without consideration as to whether or not anybody desired to purchase it.

The term "market value" is equivalent to "cash value." It means the value which a willing purchaser would pay to a willing seller of the property at the time of the taking, paid in money, taking into consideration all of the uses to which the land was adapted and for which it was reasonably capable;

In other words, the fair value of the property as between one who wants to purchase and one who wants to sell at a sale which a prudent owner would make if at liberty to fix the time and conditions of sale.

Given. [189]

GOVERNMENT'S REQUESTED INSTRUCTION No. 7

SPECULATIVE DAMAGES

I charge you that in determining what the fair market value of this property is, you are to consider that price which a willing purchaser would pay to a willing seller, neither being under any compulsion and each being able to carry out the bargain. You are to consider the present use of the property. You may also consider potential uses, if you find that

those potential uses would occur in the reasonably near future and because of that fact would impel a purchaser and a seller, in a free sale, to arrive at a different price from that based on the present use of the property. I charge you that you must not speculate on future uses. You must not allow your imaginations to run away with you. The fair market value which you are to arrive at in this case must not be based upon any dream of possible future development depending upon any contingencies which may or may not occur. You are not to consider any prospective future profits depending upon future contingencies. You will view this case in the light of your experience as men of affairs and arrive at a valuation which in your opinion would represent a fair cash market value of this property tested by the rule of good common sense, hard-headed and sound business judgment. The market value of these properties must not increase simply because of a condemnation suit. You must not expect the condemnor to pay any more for this property than would be arrived at in fair negotiations between business men acting without any compulsion and each being able to carry out his bargain. It is the fair cash market value of the property which is taken from these defendants. That and nothing more is what the government must pay.

Given as modified.

GOVERNMENT'S REQUIRED INSTRUCTION No. 8

In this case there has been some testimony on the

part of the land owners of their future plans with respect to this property. You are not to consider the personal plans of the owner except insofar as they tend to show adaptability of the lands to their highest, best and most profitable use in the reasonably near future.

Given as modified. [191]

GOVERNMENT'S REQUESTED INSTRUCTION No. 9

In this case it is admitted without dispute in the testimony that the lands condemned are a part of a holding of lands in the immediate vicinity, owned by the same respondents. In deciding this case, you are not to assume any particular type or policy of management on the part of the trustees with respect to the remainder of said lands. The very theory and hypothesis upon which this case is being tried is the assumption of a free and open market, of a willing purchaser and a willing buyer in a free transaction. In considering this case, therefore, you are not to assume that the Trustees of the Damon Estate would not release any of the lands in the immediate vicinity from their present status. And you are entitled to assume, if that fact has any bearing on market value in your opinions, that the lands immediately adjoining and in the general vicinity, are the subject of free competition in the open market.

Given as modified.

DEFTS. INSTRUCTION No. 7

In determining by your verdict what amount of money to be paid to the owners would be the full equivalent of the property taken, you should take into consideration the earning power of money as you may find it to be from the evidence in this case.

Given. [193]

DEFTS. INSTRUCTION No. 8

It is common knowledge that one of the most important factors in determining the value of property is the income which it produces. And although it is market value which you are to consider in these cases, nevertheless the investment of the proceeds by the owner is one of the elements to be considered in determining market value, because that is an element which naturally would be taken into consideration in any bargaining between an owner willing to sell and a purchaser willing to buy.

Given. [194]

DEFTS. INSTRUCTION No. 9

In this proceeding the Honolulu Plantation Company, the lessee of the Damon Estate, is not making a claim for any leasehold interest in the land.

The Trustees of the Damon Estate are therefore entitled to the full amount of compensation to be paid for the taking of the land without any deduction by reason of the fact that at the time of the taking the land was subject to the lease.

Given by agreement [195]

GOVERNMENT'S REQUESTED INSTRUCTION No. 5

In this case the Court has permitted you to receive the testimony of certain witnesses who, because of their business and experience, are termed "experts." The law receives this evidence because these experts sometimes aid in determining question of value. But I charge you that the ultimate weight you may give to the testimony of such witnesses is for you to determine. There is no rule of law which requires you to surrender your own judgment to any person testifying as an expert witness. In other words, the testimony of an expert, like that of any other witness, is to be received by you and given such weight as you think it is properly entitled to. But I charge that you are not bound or concluded by the testimony of any such witness, expert or other. Such testimony is merely the opinion of the particular witness and should be considered in the light of all of the evidence. You should consider the opportunity of such persons to know the values for which they contend. You should weigh the reasonableness or unreasonableness of their estimate of such value as demonstrated in their testimony. You should apply to this your own sound judgment and good sense in arriving at the fair and reasonable market value of this property in the light of all the evidence. If you believe from the testimony in this case of any witness, that that witness has magnified, exaggerated or overestimated the fair market value to which he has testified, because of his in-

terest in this suit, or his prejudice, or his want of knowledge or experience, or his untruthfulness, or his opportunity for or lack of opportunity of knowing the things about which he testifies, or for any other reason, then it is your [196] duty to disregard the evidence of such witness insofar as it has unjustly magnified, increased or overestimated the value of the land to be taken.

Given [197]

DEFTS. INSTRUCTION No. 10

Whether the testimony of expert witnesses is to be considered strong or weak depends largely upon the skill and character of the respective witnesses, their knowledge, experience and opportunities for acquiring information, and all attendant facts and circumstances, including the reasons, if any, which were given by the witnesses for their respective opinions.

Given [198]

DEFTS. INSTRUCTION No. 5

By order of this Court and with the consent of the parties, you went upon the lands involved in these cases and viewed them in order that you might understand and apply the evidence from seeing the lay of the land, its location and character, and you are instructed that since the testimony as to the value of the lands and the compensation to be paid for the taking of them is conflicting, you may resort

to your own knowledge including what you have seen on your visit to the locality concerning the elements which affect the value and compensation, in order to determine the relative weight to be given the conflicting testimony.

Given [199]

DEFTS. INSTRUCTION No. 11

You, gentlemen of the jury, are the exclusive judges of the credibility of the witnesses who have testified before you, and of the weight to be given to their testimony. Your verdict should be based upon the preponderance of the evidence. This does not necessarily mean the greater number of witnesses. It means the greater weight and value of the testimony which has been adduced as you may find it to be.

If you find from the evidence that the lands in question were in November 1940 worth not more than the Government contends, then it is your duty to, and I instruct you, to return a verdict in the following sums:

For Civil No. 434, 77.288 acres, the sum of $33,498.00

For Civil No. 436, 254.468 acres, the sum of $103,989.00

Given as amended [200]

DEFTS. INSTRUCTION No. 12

It is your duty to base your verdict entirely on the law and the evidence. That means, the law as

explained to you in these instructions and the facts shown by the testimony which has been given by the witnesses who have testified before you and the facts observed by you from your view of the premises in question. You will, therefore, give no consideration to anything you may have heard outside the courtroom, nor will you allow your verdict to be affected by any bias or prejudice against or any sympathy in favor of either of the parties to this proceeding.

Given [201]

DEFTS. INSTRUCTION No. 13

The court instructs you that in the decision of these cases you are to refrain from entering into what is known as a "Quotient Verdict." Such a practice is to be condemned. A quotient verdict arises in a situation where each member of the jury writes down a figure and such twelve figures are added together and then divided by twelve. The mere mention of this practice demonstrates very clearly that the figure which is arrived at does not represent the considered judgment of the jury on what the fair market value of the property is.

Given [202]

GOVERNMENT'S REQUESTED INSTRUCTION No. 1

I instruct you that there is no competent evidence introduced by the land owners in this case. Evi-

dence of value which is based upon capitalization of prospective rentals is not competent to determine the fair market value of real estate, and evidence of value which is based upon the so-called prospective selling price of subdivided lands, which have not actually been subdivided, is not competent in proof of fair market value.

Refused [203]

GOVERNMENT'S REQUESTED INSTRUCTION No. 2

I charge you that you are to return a verdict in Civil No. 436 in the sum of $103,989.00 as the fair and reasonable market value of the property condemned.

Refused [204]

GOVERNMENT'S REQUESTED INSTRUCTION No. 3

I charge you that you are to return a verdict in Civil No. 434 in the sum of $33,498.00 as the fair and reasonable market value of the property condemned.

Refused [205]

GOVERNMENT'S REQUESTED INSTRUCTION No. 6

BURDEN OF PROOF

I charge you that the burden of proof in this case

is upon the land owner, that is to say the Damon Estate, to establish their claim for the value of the land taken by the fair preponderance of evidence, that is to say by the greater weight or convincing power of the evidence. The greater weight and convincing power does not depend on the number of witnesses, but it does mean that the evidence introduced by the land owners who have the burden of proof must be more convincing in your minds and must outweigh that of the government's witnesses if you are to find a value for which the land owners contend. If you find from the evidence that the proofs are equally balanced as to the value of the land taken, then it is your duty to and I instruct you, to return a verdict in the following sums:

For Civil No. 434, the sum of $33,498.00;

For Civil No. 436, the sum of $103,989.00.

Refused, Defts. No. 11 as modified given instead. [206]

INSTRUCTION No. 6

You are further instructed that since any use for which the property is reasonably capable may be considered, if you find from the evidence and from what you saw when you visited the premises, that the land is adapted for the purpose for which the government has taken it, you may take that fact into consideration, as well as the other evidence, in determining the value of the property.

Refused [207]

In the United States District Court
for the Territory of Hawaii

Civil No. 434

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

CERTAIN PARCELS OF LAND on the Island of Oahu, Territory of Hawaii, JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR and JOHN EDWARD RUSSELL, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, HONOLULU PLANTATION COMPANY, BISHOP NATIONAL BANK OF HAWAII AT HONOLULU, TERRITORY OF HAWAII, CITY AND COUNTY OF HONOLULU, JOHN DOE ONE TO JOHN DOE FIFTY, INCLUSIVE, and MARY ROE ONE TO MARY ROE FIFTY, INCLUSIVE, unknown owners and claimants,

Defendants.

Civil No. 436

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

254.468 acres of land, more or less, in Moanalua, Honolulu, Island of Oahu, Territory of Hawaii, JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR and JOHN EDWARD RUSSELL, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, HONOLULU PLANTATION COMPANY, BISHOP NATIONAL BANK OF HAWAII AT HONOLULU, TERRITORY OF HAWAII, CITY AND COUNTY OF HONOLULU, JOHN DOE ONE TO JOHN DOE FIFTY, INCLUSIVE, and MARY ROE ONE TO MARY ROE FIFTY, INCLUSIVE, unknown owners and claimants,

Defendants.

STIPULATION AND AGREEMENT FOR CONSOLIDATION

Whereas, upon Motion of the United States of America, Petitioner above named, prior to the trial of the above cases, [209] said cases were consolidated for the purposes of trial, and by reason thereof said cases were consolidated and tried before this Court and a Jury for the determination of the fair

market value of the lands condemned herein, exclusive of crops and improvements thereon, and the only purpose upon the trial of said cases was to determine the fair market value of the lands condemned, exclusive of the crops and improvements thereon, and said fee owners of said lands condemned were the Trustees under the Will and of the Estate of Samuel M. Damon, deceased, defendants above named, and that no other parties defendant had any interest in the value of the fee simple in the lands in question; and

Whereas, the verdict of the Jury was entered in the above mentioned Civil No. 434, assessing the fair market value of the lands condemned, exclusive of crops and improvements thereon, in the sum of $61,830.40, and in Civil No. 436 assessing the fair market value of the lands condemned, exclusive of the crops and improvements thereon, in the sum of $203,574.40, and separate judgments were entered in each of said causes on August 18, 1941; and

Whereas, the United States of America, Petitioner above named, has filed its Notice of Appeal in each of said cases above named, and it is the intention of said Petitioner to appeal said cases to the Ninth Circuit Court of Appeals;

Therefore, it is stipulated and agreed by and between the United States of America, Petitioner, by Angus M. Taylor, Jr., United States Attorney for the District of Hawaii, and the Trustees under the Will and of the Estate of Samuel M. Damon, de-

ceased, Defendants, by Robertson, Castle & Anthony, their attorneys, that said causes, to wit, Civil Nos. 434 and 436, as [210] above designated, be consolidated as one cause for the purpose of appealing the same to the Ninth Circuit Court of Appeals. It is further agreed that but one appeal be prosecuted regarding such consolidated cases, and that the record be printed and treated as one, and that all considerations, orders, judgments and mandates made by the Ninth Circuit Court of Appeals be effective in each case above described, the same as if the appeal had been taken in each case individually.

Dated at Honolulu, T.H., this 2d day of February, 1942.

THE UNITED STATES OF AMERICA,
Petitioner

By (s) ANGUS M. TAYLOR, JR.
United States Attorney for the
District of Hawaii

JOHN WATERHOUSE,
ERNEST HAY WODEHOUSE,
WALTER FRANCIS FREAR and
JOHN EDWARD RUSSELL,
Trustees under the Will and of the
Estate of Samuel M. Damon, Deceased,

By ROBERTSON, CASTLE & ANTHONY
Their Attorneys

By (s) A. G. M. ROBERTSON

[Endorsed]: Filed Feb. 2, 1942. [211]

[Title of District Court and Cause—Consolidated.]

ORDER CONSOLIDATING CAUSES ON APPEAL

Upon the filing and reading of the Stipulation and Agreement to consolidate the above designated causes, and good cause [213] appearing therefor,

It is hereby ordered that Civil No. 434 and Civil No. 436 of this Court, as above designated, be and the same are hereby consolidated for the purpose of appealing the same to the United States Circuit Court of Appeals for the Ninth Circuit, and it is further ordered that but one appeal be prosecuted regarding such consolidated causes, and that the record be printed and treated as one and the same appeal.

Dated at Honolulu, T.H., this 3rd day of February, 1942.

(s) D. E. METZGER
Judge,
United States District Court,
Territory of Hawaii

[Endorsed]: Filed Feb. 3, 1942. [214]

[Title of District Court and Cause—Consolidated.]

ORDER FOR TRANSMITTAL OF ORIGINAL EXHIBITS

The Motion of the United States of America, Appellant in the above consolidated causes, for an

order directing the [219] Clerk of this Court to transmit to the United States Circuit Court of Appeals for the Ninth Circuit all of the original exhibits offered in evidence and all of the original exhibits received in evidence in the above entitled consolidated causes, together with the transcript on appeal herein, coming on to be heard, and it appearing to the Court that such exhibits are many in number and it would be inordinately expensive to reproduce all of said exhibits, and that such original exhibits are necessary for the full and proper consideration of the questions involved in said appeal, and

Whereas, due to the present War and the uncertainty of transporting said exhibits safely to said United States Circuit Court of Appeals for the Ninth Circuit, the Appellant has agreed to place in the files of this Court duplicates of said original exhibits, and the Court being fully advised in the premises,

It is hereby ordered that the Clerk of this Court be and he is hereby authorized and directed to transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit together with the transcript of the record on appeal herein, all of the original exhibits offered in evidence and all of the original exhibits received in evidence at the trial of the above designated consolidated causes, with instructions to said Clerk of said Circuit Court of Appeals to return said original exhibits to this

Court upon the rendition of final decision in said Circuit Court of Appeals, and

It is further ordered, that the Appellant herein place in the files of the Clerk of this Court duplicates of said original exhibits, said original exhibits consisting of the following: [220]

United States' Exhibits:

Ex. A—Detail map, 14th Naval Dist. Drawing OA-N1-264, approved Oct. 25, 1940.

Ex. B—Map—Moanalua and Kahauiki—Honolulu, "Drawing No. 1168 by H.T. Dec. 1932. Source W.H.&W. USGS."

Ex. C—Portion of Moanalua. Land Ct. App. 1074 at Moanalua, Wright, Harvey & Wright, March 13, 1940.

Ex. D—Map—subdivision of Land of Lot C-3-B-2 of Land Ct. App. on Map 23 filed in office of Asst. Reg. of Land Ct. into Lots C-3-B-2-A and C-3-B-2-B, Wright, Harvey & Wright, and photographs 1 to 5 inclusive attached to map.

Ex. E—Photographs 1 to 15 inclusive and map Lots C-2, C-3-A, C-3-B-1, C-3-B-2, Lot D and Lot E.

Ex. F—Site sketch Moanalua, Map Nov. 27, 1940 of Lot C-1, C-2, C-3-A, C-3-B-1, C-3-B-2-A and D.

Ex. G—Location sketch [a sketch of whole area of lands around P. H.]

Defendant's Exhibits:

Ex. 1—Deed of sale Trustees of Damon Est. to City & County of Honolulu, dated Dec. 17, 1937, 3 acres of land at Moanalua (Recorded B. 1417, p. 481)

Ex. 2—Lease dated June 27, 1927, Trustees Damon Est. and Honolulu Plantation Co. covering certain land at Moanalua, recorded Book 888, p. 111.

Ex. 3—Lease dated Sept. 12, 1940 Trustees Damon Est. to Bishop National Bank of Honolulu covering 2.249 acres of land at Moanalua.

Dated at Honolulu, T. H., this 4th day of February, 1942.

(S) D. E. METZGER
Judge,
United States District Court,
Territory of Hawaii

[Endorsed]: Filed Feb. 4, 1942. [221]

[Title of District Court and Cause—Consolidated.]

APPELLANT'S DESIGNATION OF RECORD ON APPEAL [222]

Comes now the United States of America, Appellant above named, by Angus M. Taylor, Jr., United States Attorney for the [223] District of Hawaii,

and designates all the proceedings and evidence in the above consolidated causes for inclusion in the record on appeal.

Dated at Honolulu, T. H., this 4 day of February, 1942.

THE UNITED STATES OF AMERICA,
Appellant
By (s) ANGUS M. TAYLOR, JR.
United States Attorney for the District of Hawaii

Service of the within Designation of Record on Appeal and receipt of a copy thereof is acknowledged this 4th day of February, 1942.

ROBERTSON, CASTLE & ANTHONY
Attorneys for John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, Deceased.
By (s) A. G. M. ROBERTSON
for the foregoing attorneys.

[Endorsed]: Filed Feb. 4, 1942. [224]

[Title of District Court and Cause—Consolidated.]

TRANSCRIPT

Of proceedings had and evidence adduced before the Honorable Delbert E. Metzger, Judge Presiding, commencing at 9:00 o'clock a.m. Monday, July 21, 1941; the Petitioner being represented by John J. Courtney, Esquire, Special Assistant to the Attorney General of the United States; the defendants John Waterhouse, Ernest Hay Wodehouse, Walter [228] Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, being represented by A. G. M. Robertson, Esquire, of the law firm of Robertson, Castle & Anthony; the defendant Honolulu Plantation Company being represented by Roy A. Vitousek, Esquire, of the law firm of Stanley, Vitousek, Pratt & Winn.

Upon stipulation of counsel, and with the approval of the Court, Anne R. Whitmore was by the Clerk duly sworn to act as Court Reporter in the above entitled proceedings.

Mr. Vitousek: I appear for the Honolulu Plantation Company. In this matter I wonder if we could have a stipulation entered of record: Honolulu Plantation Company is one of the respondents, and it is my understanding that the purpose of this case is to determine the value of the fee simple of the lands in question. We made our adjustment with

the owner, the lessor, so the lessor will carry the burden of the case. With regard to the lessee's interest in the improvements and crops, the claim for damages, I believe that would be a matter for subsequent adjustment, and if necessary to come to Court we will file a motion to consolidate the various cases in so far as the Honolulu Plantation Company is concerned, so we will not appear in this case.

The Court: Your client's interest is solely presented as a lessee?

Mr. Vitousek: We have had our adjustment with the lessor, so the lessor may claim for full value on the land. The lessee makes no claim. [229]

Mr. Courtney: Satisfactory to the Government. I believe that preliminary to that motion, however, we should make a motion to consolidate the two cases, Case No. 434 and Case No. 436.

The Court: I will entertain that motion.

Mr. Courtney: I so move and it may be entered in the Term Minutes.

The Court: Any objection to the consolidation of Cases Nos. 434 and 436?

Judge Robertson: No objection, Your Honor.

Mr. Vitousek: No objection.

Mr. Courtney: No objection.

The Court: The motion for consolidation is granted, and the stipulation is agreeable to all parties of record and to the Court. Are the parties all ready?

Mr. Courtney: The Government is ready, Your Honor.

Judge Robertson: I appear for the Trustees under the Will of Samuel M. Damon, deceased. We are ready.

The Clerk: Civil No. 434, the United States of America, Petitioner, versus Certain parcels of land on the Island of Oahu, etc., Defendants, and Civil No. 436, the United States of America, Petitioner, versus 254.468 acres of land, etc., defendants. Cases called for trial.

The Court: There are no other parties interested in the value of the freehold?

Mr. Courtney: Not as to the value of the fee, Your Honor.

The Court: Draw a jury, Mr. Clerk.

(Thereupon the Clerk drew the names of twelve persons from the jury panel, calling their names aloud, and the [230] said members of the jury panel so called took their places in the jury box.)

The Clerk: Will all the jurors in the courtroom arise and raise your right hands please.

(Thereupon all the members of the jury panel were by the Clerk duly sworn on their Voir Dire as to their legal qualifications to serve as trial jurors.)

Mr. Courtney: May it please the Court and members of the jury panel: This is a condemnation suit by the United States of property which is located at the outside of Pearl Harbor gates and adjoining

Hickam Field. There are two cases being consolidated in the trial. The one is the condemnation by the Federal Works Agency for the United States Army housing. That is known as Civil No. 434 and it consists of 77 and a fraction acres of land for Army housing, and adjoining that, and in the direction my finger now points, down Kamehameha Highway is the condemnation by the United States of some 254 acres of land to be used, and actually now in use, for Naval housing facilities. There is also a small triangular piece in that 254 acres at the point indicated by my finger now,—that is between Kamehameha Highway and the entrance of Pearl Harbor and what I would call the Schofield Road, —that is the triangle. You have heard indicated that the only question that the jury will be called upon to decide will be the fee value of the land. The property was occupied by the Honolulu Plantation Company at the time of the condemnation, but as you heard here this morning any questions of differences of opinion between the Honolulu Plantation Company and the Government and the fee owners is not before you, if there should be any such differences. Neither are we concerned with the value [231] of any improvements on the land, whether put on there by the Honolulu Plantation Company or anyone else. The defendants in this case are the Trustees of the Damon Estate and, of course, the beneficiaries of the Damon Estate. The Trustees are John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell. The beneficiaries

of the Damon Trust Estate, and who were the fee owners of both of these properties, are Mary M. Damon, Samuel R. Damon, Harriet Baldwin, Frances Damon, Joan Damon and Henry E. Damon. The Bishop National Bank has a bank building on the property. Any controversy that may exist with reference to that building is not before the jury. We are dealing solely with the fee value of the land. The reason the cases are consolidated of course is because the lands adjoin one another and because the defendants in each case are exactly the same.

(Thereupon the impanelling of a jury was commenced and completed at 10:45 o'clock a.m., and thereupon the Jury was duly sworn and impanelled.)

The Court: All those jurors who were called this morning and have not been sworn to try this case are excused until further call by officers of the Court. We will take a recess at this time.

(Recess—10:50 to 11:05 a.m.)

Mr. Courtney: At this time the Government moves that the jury be permitted to view the premises under such restrictions and regulations and requirements as the Court may impose. I suggest that the view should occur tomorrow morning as the Court is not to sit in the afternoons. The [232] distances are not great and the access is not very difficult. I offer the suggestion that we leave here at say 9:00 o'clock tomorrow morning, that would be plenty of time.

Judge Robertson: I join in the suggestion, Your Honor. I think the jury in any condemnation case should see the land we are talking about.

The Court: What about transportation?

Mr. Courtney: I shall undertake to arrange transportation, just as was done before. We will have the cars here at the building at 9:00 o'clock tomorrow morning, or at any time the Court directs.

Judge Robertson: Does that include transportation for me and my client, or do you want us to furnish our own?

Mr. Courtney: We will be glad to furnish transportation. I am frank to say I had not planned on going with the jury unless I am required to do so. I thought if the jurors were shown the borders, or the boundaries of the property by one representative of the Army and Navy and one of the land owner, who would know the location of the boundaries, that that would be sufficient.

The Court: You have an engineer or surveyor?

Judge Robertson: I can produce an engineer and surveyor, or I can have Mr. Sam Damon there.

The Court: That will be just as good, and the plaintiff will have the Naval Engineer?

Mr. Courtney: I suppose in deference to the Services I might also have got an Army Engineer. In any event we will have someone there to show the boundaries.

Judge Robertson: You will have a map? [233]

Mr. Courtney: And a map.

The Court: May I see the map.

Mr. Courtney: (Handing to the Court a map of the area involved in these proceedings) I did not exhibit it to the Court because it wasn't introduced in evidence.

The Court: Gentlemen of the Jury, unless counsel on either side wants to make some further preliminary statement of the case at this time there will be nothing more for us to do this morning. Tomorrow morning meet here promptly at 9:00 o'clock. At that time conveyances will be here and the Court and jury and counsel will go down and look at this land, so as to get it fixed in your minds, where it is and what it is like, geographically, topographically, etc.

Mr. Courtney: There will be no testimony tomorrow?

The Court: None on the ground. Whether we will have any testimony here or not I would like to hear from you. Do you want to open your case with testimony after we return here?

Mr. Courtney: I think it will be nearly 11:00 or half past 11:00 before we finish viewing the property. I would suggest that we just view the property tomorrow and then start the next day with the testimony.

The Court: If it is going to be as late as that perhaps you are right. We will just devote the day to looking at the land tomorrow, is that satisfactory, Judge?

Judge Robertson: Yes, Your Honor. We will be here at 9:00 o'clock, Your Honor.

The Court: I don't know that you will have any great amount of walking to do, but I call it to your [234] attention that we are going to look at real estate, and if you think it advisable to put on a pair of tramping shoes do so. The jury is excused until 9:00 o'clock tomorrow morning, Meet here at that time.

(Adjourned 11:15 o'clock a.m.)

On Tuesday, the 22nd day of July, 1941, at 9:07 o'clock a.m., all parties being present in the court-room, the following further proceedings were had:)

The Clerk: Civil No. 434 and Civil No. 436. Cases called for further trial.

The Court: Let the record show the jury are all present and in the box.

Mr. Courtney: If the Court please, I have a map prepared and outlined indicating the two different areas involved, which I have exhibited to counsel, and if the Court is agreeable and counsel for the defendant that it be introduced in evidence and used for such detail as contained thereon, I offer the same in evidence.

The Court: Any objection to the map?

Judge Robertson: No, Your Honor. I understand this map will be taken along this morning to have it on the ground.

The Court: Yes. It may be accepted in evidence marked as Government's Exhibit "A". I suggest that you pass it to the jury and explain it to the

jury, if there is any explanation needed, at this time.

Mr. Courtney: I doubt if there is any explanation needed except to say the red lines indicate the Army the yellow the Navy. I think the other detail is perfectly obvious. This area, Civil No. 436, makai of the Highway [235] (of the Highway) is marked into three sections, as a matter of fact it is all one section.

The Court: There are two distinct lots, one being taken by the government under some housing agency——

Mr. Courtney: Federal Works Agency which is the successor of the W.P.A., and which has taken over and undertaken the Army housing.

The Court: On the bigger or the smaller piece?

Mr. Courtney: The smaller.

The Court: That is Case——

Mr. Courtney: That is Case 434.

The Court: And the other is being taken by the Navy?

Mr. Courtney: That is right.

The Court: The jury will have to keep that in mind, I take it, because each lot will have to be separately appraised or assessed by the jury.

Mr. Courtney: Yes, Your Honor. I want to turn this map over to the jury.

The Court: It would be better to turn it over to the Clerk.

(Mr. Courtney does so.)

The Court: Mr. Clerk, mark the original Government's Exhibit "A".

(Thereupon the map referred to was by the Clerk marked Government's Exhibit "A")

The Court: Anything else to present to the Court or to the jury before we go to view the property?

Judge Robertson: Nothing on behalf of the defendants.

Mr. Courtney: Nothing on behalf of the Government.

The Court: Transportation ready? [236]

Mr. Courtney: Ready, Your Honor, on the side of the building.

The Court: The jury will understand they are to keep together and to listen to no remarks of anyone other than those designated by the Court to point out the boundary lines. That is the principal thing any outside person will have to do. Mr. O'Farrell on behalf of the Navy and Mr. Damon on behalf of the defendants will be there to designate the boundary lines. The purpose for which the jury goes to view the land is to make themselves acquainted with the location, the nature and quality of the land, its proximity to other things, that is its general surroundings, to be better prepared to consider and weigh the evidence. You do not go out to determine at this time for yourselves the value of the land, and listen to nothing that tends to try to impress you as to the value or anything else concerning the land. All the evidence you are to receive will be from the witness stand here, or at least in the courtroom. No testimony will be taken today while you are viewing the premises, and I admonish

you, if anyone should try to impress upon you their views as to value or other pertinent circumstances in connection with the land to call the attention of the Court to that fact, either on this occasion or at any time during the course of the trial. We will recess.

(Thereupon at 9:15 o'clock a.m., the Court, jury, Clerk, Marshal, Court Reporter, counsel, Mr. Oliver O'Farrell, Engineer, United States Navy, and Mr. Sam R. Damon, proceeded to the lands referred to in these proceedings, [237] where Mr. O'Farrell on behalf of the Government and Mr. Sam R. Damon on behalf of the defendants pointed out to the jury the various boundary lines.)

The Court: Jurymen, your official duty for the morning is over now. You are recessed until 9:00 o'clock tomorrow morning to appear at the courtroom for the further trial of this case. The rest of whatever excursion we make is merely a sightseeing tour, taking advantage of the fact that we are out this way, and as to what you have seen, the lands in question, you will retain in your memory any physical aspects, the general surroundings, location, etc., and do not discuss the case or the purpose of the trip or what you have seen with anyone. Wait until you get the evidence, you can then discuss it in your deliberations as to the question of value. Recessed officially until tomorrow morning at 9:00 o'clock.

(Adjourned—11:00 o'clock a.m.)

On Wednesday, the 23rd day of July, 1941, at 9:00 o'clock a.m., all parties being present in the courtroom, the following further proceedings were had:

The Clerk: Civil Cases Numbers 434 and 436. Cases called for further trial.

The Court: The jury is present and in the box.

Opening statement to the jury by Mr. Courtney.

The Court: Judge Robertson, will the defendant care to make any opening statement now?

Judge Robertson: I think I will reserve my statement to the usual time, Your Honor. [238]

TESTIMONY FOR THE GOVERNMENT

Mr. Courtney: I assume it may be stipulated that the values to which the witnesses address themselves are values in November of 1940. In other words, the date and the year of immediate possession.

Judge Robertson: There are two different dates, about a week apart. However, as far as the examination of witnesses is concerned I think we can use the month of November, 1940.

Mr. Courtney: The month of November, 1940. One condemnation proceeding was filed on the 20th of November, 1940, and the other on the 27th of November, 1940. I take it there was no substantial change in that time. Call Mr. Crozier.

CHARLES CAMPBELL CROZIER

being first duly sworn as a witness for the Petitioner testified as follows:

Direct Examination

Questions by Mr. Courtney:

Q. Mr. Crozier, for the sake of the record, you will have to give your full name.

A. Charles Campbell Crozier.

Q. And your business, Mr. Crozier?

A. At present I am Deputy Tax Commissioner in charge of the real and personal property of the Territory of Hawaii.

Q. How long have you been so employed?

A. July of 1931.

Q. Prior to that time what was your business? [239]

A. I was for a period of two years an independent realtor, in the real estate and general insurance and agency business.

Q. And prior to that time?

A. For some fifteen years I had been connected with the Guardian Trust Company that subsequently merged with the Bishop Trust Company, some fifteen years.

Q. In the Real Estate Department?

A. General Land Department.

Q. Having to do with the value of property and its management and sale? A. That is correct.

Q. Have you kept abreast of the transactions relating to real estate in this Territory?

(Testimony of Charles Campbell Crozier.)

A. I have.

Q. You were born and raised in the Territory?

A. I was.

Q. Lived here all your life? A. I have.

Q. Are you familiar with the various uses made of various classes of land in this Territory?

A. I am.

Q. Followed the development of various areas or parts of this Territory? A. I have.

Q. And in particular the Island of Oahu?

A. And in particular the Island of Oahu.

Q. Are you familiar with the lands involved in these condemnations? A. I am.

Mr. Courtney: I think for the sake of the record I [240] will have to speak of them as "these lands", —I see no point in breaking it up.

Q. As a result of your experience in the real estate business and in connection with your work in the Tax Division, or general experience, are you able to form an opinion as to what the fair and reasonable value of these lands is considering their highest and best uses? A. I believe so, sir.

Q. Did you make an examination of these properties prior to the time they were condemned?

A. Yes.

Q. Will you step down to this board please, and just tell the Court and jury, referring to the lands in Civil No. 434, based on your examination what use was being made of it?

A. Prior to the date of condemnation, at the re-

(Testimony of Charles Campbell Crozier.)

quest of the United States Government, I was asked to view this property here (witness indicates an area on Government's Exhibit "A"), that is the area of some 77 acres under case No. 434, and subsequent to that I was also asked to view the property on the Honolulu side of 434 and the property mauka, of it, which is the triangular piece which is under Case 436.

Q. Tell us what you observed with respect to Parcel 434?

A. Prior to the date of condemnation, or prior to November, 1940, both these properties were situated on the two highways, one leading out to the country, the Kamehameha Highway, and then the lower, Puuloa Road, that leads into the United States Navy Yard Gate.

Q. The question is with reference to 434, just tell us what you found, the use made of 434? [241]

A. Under 434, in November, 1940, a little area known as Lot C-1 was unoccupied or unimproved, or no use was being made of it. There had been a canefield there and it had been allowed to fallow; the balance of the acreage was in growing cane.

Q. With respect to the other properties, 436, what was their condition?

A. The two parcels in 436 were both in growing cane.

Q. Did you consider the location of these properties with respect to development nearest them?

A. I did.

Q. And as a result of your examination and based on your experience did you arrive at an opin-

(Testimony of Charles Campbell Crozier.)

ion as to what the fair and reasonable market value of the parcel known as 434 was as of November, 1940? A. I did.

Q. What, in your opinion, was the fair and reasonable market value of the parcel, or case 434, as of November, 1940?

A. The value of the land in case 434, containing an area of 77.54 acres, was $33,498.00.

Q. Now in arriving at that fair market value, your opinion as to the fair market value of this property you just testified to, did you attempt to apportion that value among the different classes of land, or the portions of that property, with respect to its highest potential use? A. I did.

Q. Now explain to the jury how you apportioned the value you have indicated, how you did it?

A. In the valuation of land there are certain fundamental factors that can be taken into consideration, one is its [242] location, second is its size and shape, third its topography, its possibilities and the utilities that surround the parcel, and, fourth, might be termed its productivity, or ability to produce. This parcel lies on the makai side of the highway leading to the Navy Yard. Most of it had been used for the growing of cane,—that had been going on for many years. In going over the land it was my opinion that there was a certain frontage along that highway that had possibly a higher value than the cane land value.

Q. For what reason?

(Testimony of Charles Campbell Crozier.)

A. The road frontage. This area along the road, it had the environment of the road and the factors that go into making road values. There had been further toward the Navy Yard Gate certain improvements other than the growing of cane along that same highway, the bank site and the garages outside the Navy Yard Gate.

Q. There was the Bank of Hawaii on the mauka side and the Bishop Bank on the makai side?

A. Bank of Bishop was in Hickam Field reservation. Lot C-1 had been cut out to serve some utility for the Bank, so I felt there was a close environment here that had possibly more value than the rear area which was and is being used for the cultivation of cane.

Q. What, in your opinion, would be the apportionment of that valuation?

A. Bearing in mind that the valuation is taken from some area that might be termed the "hot spot" outside the Navy Gate, we found an environment by reasons of its use and occupancy at a slightly higher rate than the surrounding back area of the cane land. That valuation [243] was its highest at the point where that condition exists. As you get away from that that land tapers off somewhere here (indicating a point on Government's Exhibit "A"). No locations as we found here showed that at the corner of the Hickam Field Boundary. I felt it was worth 2½¢ a square foot

(Testimony of Charles Campbell Crozier.)

at this point. As we came toward town this frontage of over 1,000 feet (witness indicates a point on Government's Exhibit "A") it decreased in value. When I came to this point (witness indicates a point on Government's Exhibit "A") my figure was 1¼¢. Merging those two you would find 1⅞¢, or at the rate of $816.75 an acre for this frontage of 250 feet.

Q. That is the depth from——

A. Frontage of 200 feet.

Q. From the mauka boundary which you say has this slightly higher value with respect to the remainder of the property?

A. Yes. Taking the frontage out there remained roughly 71 acres in the rear, and that in my opinion had a value of $400.00 an acre.

Q. That was based on what you considered to be its highest and best use?

A. Under the conditions, yes.

Q. What was that?

A. For the growing of cane.

Q. Did you know what the productivity of this land had been? A. I did.

Q. What was it?

A. This area is made up of two fields, Field 96 was on the Hickam or Navy Yard side of the tract and it is a portion [244] of the Field 95 that overlapped into both the tracks. The productivity or the tons of sugar slightly vary in Field 95. The productivity estimated from its crop record here

(Testimony of Charles Campbell Crozier.)

was 10.70 tons of sugar per acre, and in Field 96 the productivity was 10.10 tons of sugar per acre. Field 95 was 10.70 tons of sugar per acre and Field 96 10.10 tons of sugar per acre.

Q. You considered all that in arriving at your opinion of values?

A. Yes, in each case to the Plantation records relative to the yields, and the factors that go to determine cane land value.

Q. This field, or those fields, have been in use for cane quite a number of years?

A. For many years.

Juror: May I have the permission of the Court to ask the witness a question?

The Court: Yes.

Juror: Mr. Crozier, this 10.70 and 10.10 tons of sugar per acre, do you mean by that one crop or is it an average?

Witness: Estimated yields for these fields. The record heretofore has been slightly lower, but they have changed the grade and type of cane and some of their methods of cultivation.

Juror: The last crop harvested?

Witness: Yes. From the growing record they estimated this tonnage.

Mr. Courtney: Any further questions?

Q. (By Mr. Courtney): Now passing from that over to Case 436, what was your opinion of that as to the fair and [245] reasonable market value of those two properties, for the land only?

(Testimony of Charles Campbell Crozier.)

A. Dealing with the 190 odd acres, the 193 acres of Case 436 on the lower side of the road, the same factors in valuation are present, and that is that the 193 odd acres, 192 odd acres, the lower portion has a road frontage. Bearing in mind we have established, arrived at a valuation for the road frontage on 434, with that environment carried on to a point where the two roads intersect, or the Kamehameha Highway goes into Puuloa Road, and at 1¼ cents at this point, that same environment, by reason of the conditions then existing, carried to the right jog of the road, at 1¼ cents a square foot or $544.00 an acre for that 200-foot zone.

Q. That is an average, giving the greater value to the portion of the land which is nearer the Gate?

A. That is correct. That is this piece (witness indicates an area on Government's Exhibit "A").

Q. That follows your same reasoning that you used with respect to Case 434?

A. There is a division of flow of traffic at this point (witness indicates a point on Government's Exhibit "A") from the jog in the road opposite the intersection. The balance of the property would be carried at 1-cent or $435.00 an acre.

Q. That is for the frontage? A. Yes.

Q. That has a depth of 200 feet?

A. That has a depth of 200 feet. That is the zone,—we zoned that and called it the economic zone of influence. [246] Now, the balance of the area is all in cane and represents about 173 acres of the

(Testimony of Charles Campbell Crozier.)

192 acres, and that in my opinion had a value of $400.00 an acre.

Q. How about the productivity of the cane on this land makai of the highway in 436?

A. Those 192 acres consist of a number of fields of Honolulu Plantation. Field 92, or the field nearest Honolulu, and that field overlapped, they took a portion of the field, Field 92. Field 92 had a highest productivity, I believe, of 11.90 tons of sugar per acre. They have changed their cultivation methods and grade and type of cane, and these estimates are the Plantation's estimates for the present crop that is growing and to be harvested.

Q. How about prior crops?

A. The productivity was slightly lower for Field 92.

Q. Field 92 had a productivity of 11.90 tons of sugar per acre? A. Yes.

Q. Field 93?

A. 10.30 tons of sugar per acre. Field 94 was in the middle here (indicating an area on Government's Exhibit "A") yielded 10.70 tons of sugar per acre.

Q. Can you give us the acreages of these fields, Mr. Crozier?

A. Yes. Field 92 being a portion of the field and that portion of the field taken was 39.88 acres. Field 93, the total field was taken, contained 58.25 acres. Field 94, the total field was taken, contained 62 acres.

Q. Now 95, which overlaps? [247]

(Testimony of Charles Campbell Crozier.)

A. Field 95 contained 24.25 acres.

Q. What about the productivity of that?

A. That was 10.70 tons of sugar per acre.

Q. What do you consider the highest and best use of the land which lies back of this road frontage?

A. This area here (witness indicates an area on Government's Exhibit "A") the growing of cane.

Q. With respect to the property which is located mauka of the highway, the triangular piece?

A. The triangular piece is a little different,—different shape, little different conditions exist. It is surrounded by the main highway going out here (witness indicates a point on Government's Exhibit "A"). A portion of the property lies at an intersection, and it was my opinion that the tip of the intersection had what we call road frontage environment and could be used for something possibly more than its past use, could be given over to something more than the growing of cane. It has roughly 64 feet of frontage. There are two depths, it is not straight, it is pointed, and a 200-foot environment or an area in there of roughly an acre and a half, 1.51 acres, I felt carried a value of 2-cents a square foot. Going out the highway we have the same conditions as on the lower side; there was a certain amount of road frontage environment that carried a cent a square foot, and the balance inside which is for the cultivation of cane at $400.00 an acre.

Q. What about the productivity of cane on this triangular piece?

(Testimony of Charles Campbell Crozier.)

A. Within Lot "D", or this triangular piece of land [248] there are two fields, 97-A and 97-B, and the productivity of 97-A is 10.10 tons of sugar per acre, and 97-B is 10.10 tons of sugar per acre; they both have the same estimated tons of sugar per acre.

Q. Was that after the change was made in the type and grade of cane, the estimate? A. Yes.

Q. What was the experience prior to that time as to yield? A. Less.

Q. I notice, Mr. Crozier, that you don't make the same distinction on the frontage, or that portion which is nearest the gate at the lower left hand corner which you did with respect of 434, why is that?

A. This cane land of Lot "D" has no frontage environment at all because it adjoins the O. R. & L. tracks. There is no way of capitalizing or making use of it as it is next to the railway right-of-way. It is not a public highway. You could not use that frontage at all by going across the tracks.

Q. I think you testified that you considered the general environment of these properties?

A. Yes.

Q. Both of them? A. I did.

Q. In your opinion, the sums you testified to be the fair market value, do they represent the fair market value considering all the possible uses of the properties? A. They do.

(Testimony of Charles Campbell Crozier.)

Q. Which would reflect themselves in the present market value? [249]

A. If I could just finish——

Q. I am sorry, I thought you had. Go ahead.

A. Field 97-A has 46.50 acres of cane; Field 97-B has 11 acres of cane; that makes a total of cane in 62 parcels of 436 of 241.88 acres.

Q. Now, the land itself lies fairly level?

A. That is correct.

Q. On both sides of the highway? A. Yes.

Q. It has no utilities serving it other than the road? A. No. Do you want the values?

Q. Will you apportion the values of these two tracts?

A. The tract, the lower side of 436 of 192 acres in my opinion has a valuation of $78,706.00, and the triangular portion of 436 has a valuation of $25,283.00, or a total valuation for the land in 436 of $103,989.00.

Mr. Courtney: I think there are no further questions, Your Honor.

Cross Examination

Questions by Judge Robertson:

Q. With regard to the 77-acre area in Case 434, beginning at the Hickam Field entrance, you put a value of 2½ cents a square foot on that, as I understand it? A. For 200 feet, Judge, yes.

Q. Is that the far end of that line?

A. That is the far end of Case 434.

(Testimony of Charles Campbell Crozier.)

Q. Adjoining the land in 436?

A. That is correct.

Q. That I think you said figured at——

A. 1.87. [250]

Q. 1.87? A. Yes.

Q. Cents? A. Cents, Judge.

Q. That is how much an acre?

A. At the rate of $816.75 an acre.

Q. That is for that 200-foot strip, as I understand you were allowing in the 77-acre area?

A. That is correct, Judge.

Q. What leads you to differentiate in these areas, that is to say you put a higher value on this 200-foot strip than you do on the rest, what is that?

A. You are getting away from a point that has the highest value in that area. The highest value of the ownership outside the Navy Yard would be immediately outside the Navy Gate. That has been somewhat well established by the use that that area has been turned over to outside the Navy Gate, the bank went there, the mediocre service stations went there.

Q. In other words, that 200-foot strip had a higher and better use than for cane growing?

A. Yes, that is correct.

Q. A more profitable use?

A. That is correct.

Q. In other words, the owner could rent that strip at a higher rental than the cane area in the rear? A. That is correct.

(Testimony of Charles Campbell Crozier.)

Q. Your idea of putting that higher value on that strip is because a willing buyer would take that factor into consideration in making an offer to buy the land, is that the idea? [251]

A. If he was looking for that type of property, Judge, yes.

Q. In other words, when you talk about market value here you mean the price that a willing buyer would pay to a willing seller in November, 1940?

A. That is my understanding of the definition of market value.

Q. And that willing buyer is assumed to be intelligent enough to have in mind the possible uses that that land could be put to?

A. That is correct.

Q. In other words, he would not necessarily be bound to maintain cane cultivation in that area after he purchased it?

A. If he was contemplating it for anything other than that that is what he could have in mind. If buying in for cane he would not pay any additional valuation for road value.

Q. It is assumed a willing buyer would take into consideration the nature and situation of that land and the purposes for which it was reasonably adapted? A. That is correct, Judge.

Q. Including the best and most profitable use?

A. That is correct.

Q. Taking all those things into consideration then, in your aggregate valuation here, that is your

(Testimony of Charles Campbell Crozier.)

opinion of what that willing buyer would have paid a willing seller in November, 1940, for that 77-acre area? A. That is correct.

Q. I assume then back of this 200-foot strip that faces the highway there, you would be unable to see anything higher [252] or better for that area than cane cultivation?

A. That is my opinion, Judge.

Q. Did you make any investigation along that line?

A. Yes; there was a question of whether you could take that back area, by reason of its size and other factors, and use it for something better than cane land, but there are many other areas that could be used for that in this general location that would possibly be absorbed or taken prior to this 71 acres in the rear.

Q. That is the best you could see in that area?

A. That is correct.

Q. Now taking Lot "D" the gore lot as it is sometimes called, portion of Case 436, on which side of that lot did I understand you to consider a strip 200 feet deep?

A. On the makai side of Kamehameha Avenue, or the mauka boundary of Lot "D".

Q. That is running from the mauka tip of that lot down to the junction?

A. The junction on the northerly point, Judge, yes, from the tip going out Kamehameha Avenue out to the country.

(Testimony of Charles Campbell Crozier.)

Q. This 200-foot strip, as I understand you, faces on the Kamehameha Highway running from the mauka tip down to the junction of the two highways? A. That is correct, Judge.

Q. And in that connection you allowed nothing for a corresponding strip along Dillingham Boulevard? A. Nothing at all, Judge.

Q. In differentiating a 200-foot depth along Kamehameha Highway from the rest of the area, you did that for what reason? [253]

A. As you cover the ground you find that this tract, this triangular tract has a road frontage. By reason of its location, its proximity and the different factors, that 200-foot strip along the road could have a slightly higher value than the rear agricultural value. In other words, a man would not sell an acre in the middle of Lot "D" at the same price as he would sell an acre along the road.

Q. What difference between the two have you figured out?

A. The factors or value, Judge?

Q. The value. For instance, I understand you to say there is a 200-foot strip along Kamehameha Highway which you have figured at 2-cents a square foot, what would that be an acre?

A. Kamehameha frontage, Judge, would be 1-cent a foot, that is $435.00 an acre, the 2-cents is for the tip.

Q. That 2-cents is just for the tip?

A. Just the corner half acre. Then the road

(Testimony of Charles Campbell Crozier.)

frontage going out Kamehameha Avenue is a cent a square foot or $435.00 an acre, and the rear acreage of some 48 acres is $400.00 an acre.

Q. In other words, what you call the cane land area you value at $400.00 an acre?

A. That is correct, Judge.

Q. And the road frontage at $35.00 an acre additional, in other words, $435.00 an acre?

A. That is correct, Judge.

Q. Is that the main difference you can find between those two areas? [254]

A. That is my opinion, Judge.

Q. Similarly, with what you have said with reference to the 77-acre area in 434, when you say that there is a better value for this 200-foot strip along Kamehameha Avenue, that is based on the idea that a willing buyer would take that situation into account in making his price?

A. That is correct. If he had the choice between the frontage in 434 and Lot "D" he would take the Lot "D" frontage and pay the higher price.

Q. In other words, you attribute the greater value to the road frontage in 434 then you do as to this lower lot? A. I do, Judge.

Judge Robertson: That is all.

Mr. Courtney: That is all.

The Court: We will take a recess before you call the next witness.

(Recess—9:55 a.m. to 10:15 a.m.)

(Testimony of Charles Campbell Crozier.)

Judge Robertson: If the Court please, may I be permitted to ask Mr. Crozier another question?

The Court: Yes. Mr. Crozier, Judge Robertson wants to ask you another question as a witness.

Q. (By Judge Robertson) Mr. Crozier, when you had this subject of values under consideration and arrived at the result that you have described here, were you aware of the fact that there was a lease on these areas to the Honolulu Plantation?

A. There were two leases. Lot C-1 was under lease to the Bishop National Bank, that is the small portion in 434, and the balance of the land was under lease to the Honolulu Plantation and had about two years to go. [255]

Q. Do you remember the date of the expiration of that Honolulu Plantation lease?

A. To expire December 31, 1943, being a 15-year lease from January 1, 1929.

Q. And in arriving at the values which you have stated, being your opinion of what a willing buyer would have paid for that land in November, 1940, you had the fact that there was that lease in mind, did you not?

A. That is correct. The area in cane carried a $23.50 per acre rental valuation and a man buying it would have to wait until the expiration of the two leases.

Q. And in the meantime he would get the rent?

A. That is correct.

Judge Robertson: That is all.

Mr. Courtney: That is all, Mr. Crozier.

VINCENT FERNANDES

Being first duly sworn as a witness for petitioner, testified as follows:

Direct Examination

Questions by Mr. Courtney:

Q. Your full name, please?

A. Vincent Fernandes.

Q. Your business?

A. Licensed real estate broker and appraiser.

Q. Tell us some of your previous experience in that business?

A. My experience as an appraiser extends over a period of 36 to 37 years, twenty-five continuous years as an deputy assessor in the local tax office, between the years [256] 1903 to 1928. Resigned that position, joined the Realty Board and got my broker's license. I have been active ever since. I am Chairman of the Territorial Board of Appraisers for the Territory covering the Island of Oahu. I have served continuously from the year 1930 as an active member of the Appraisal Committee of the Honolulu Realty Board, at present I am its Chairman. I have held the Chairmanship for eight years. I am Chairman of the Appraisal Committee for the First Federal Building and Loan Association and the Pioneer Building and Loan Association. I have appeared in the Courts of Honolulu as an expert appraiser in large condemnation suits. I have done practically all of the appraisals for the City and County for a period of eight to ten years.

(Testimony of Vincent Fernandes.)

Q. Are you a member of any Real Estate Associations of national affiliation?

A. I am a member of the American Institute of Real Estate Appraisers, commonly known as the M.A.I.

Q. Is that the result of an examination?

A. That is correct.

Q. Certain specific requirements?

A. Yes, requirements, age is one of the requirements; you have to be at least thirty years old to be an active M.A.I. and eight years' experience, and pass a written and oral examination.

Q. Now, Mr. Fernandes, you have lived in the Territory for a great many years, have you not?

A. Arrived here in 1883, lived here ever since. I was about a year old at that time.

Q. You have kept abreast of the prevailing prices of real estate? [257] A. I have.

Q. Familiarized yourself with land uses?

A. Yes.

Q. Adaptability?

A. Yes, I have been very active in the directorate of the Realty Board, Past President, Director, for this year Chairman of the Taxation Committee, Legislative Committee.

Q. Did you make an examination of the properties involved in these two suits?

A. I did.

Q. For the United States? A. Yes.

Q. In your testimony I am going to ask you to

(Testimony of Vincent Fernandes.)

give to us the November, 1940 values, when these two properties were condemned. You weren't in the courtroom when Mr. Crozier was on the stand?

A. I was not.

Q. Tell us what you observed and what you considered with respect to the parcel which is known as Case 434, that is the Army housing site, what kind of land was it, what was it being used for, and what is its best use in your opinion?

A. The property is located on the Easterly boundary of Hickam Field and approximately 8-1/2 to 9 miles from the civic center of Honolulu. It is level land was planted to cane under lease to the Honolulu Plantation. On the mauka-ewa corner a small lot was leased to the Bank.

Q. Bishop National Bank you mean?

A. Yes. The property has a frontage of 1293 feet along the southerly boundary of Puuloa Road, has a width of 2047 [258] feet and contains an area of 77.288 acres.

Q. Considering the location of the property and its size, nature, etc., and based on your experience, did you arrive at an opinion as to what the fair and reasonable market value of this property was in November, 1940? A. I did.

Q. What, in your opinion, was the fair and reasonable market value in November, 1940?

A. $33,498.00.

Q. Having arrived at that opinion of the value, did you apportion that value between the different

(Testimony of Vincent Fernandes.)

portions of the land, or between the various classes of land?

A. I did. I zoned the first 200 feet back from Puuloa Road and gave that a higher value than I did to the remainder of the land, which I classed as cane land.

Q. Tell us why?

A. Due to the proximity to the street I gave it a slightly higher valuation than I did to the remainder.

Q. What, in your opinion, was the value of the property attributable to, the frontage, under your valuation?

A. The portion of the 200 feet toward Hickam Field I gave that 2-1/2 cents a square foot, or $1,089.00 an acre. The other portion of the frontage toward town I gave that a valuation of 1-1/4 cents, or $544.50 per acre, an average of $816.75 an acre for the 200-foot zone.

Q. In your opinion what was the proper apportionment of valuation to the rear portion of that land? A. $400.00 an acre.

Q. What did you consider the most advantageous use of that rear property? [259]

A. For cane use,—its present use.

Q. It had been used for cane for some time?

A. Ever since I can remember.

Q. Now the acreage which you placed at 2-cents a square foot is the acreage marked C-1 on this map (indicating Government's Exhibit "A"),

(Testimony of Vincent Fernandes.)

a 200-foot depth on that corner, is that right?

A. Yes, that is correct.

Q. Where the Bishop Bank had either a lease or some arrangements for parking, is that right?

A. That is correct.

Q. Why did you assign the larger value to that corner?

A. Because of its proximity to the environment, which is the Post, which is the Navy Yard and Hickam Field.

Q. With respect to the property known as Case 436, take that property, particularly makai of the highway and the railroad, did you arrive at an opinion as to what the fair and reasonable value of that property was? A. I did.

Q. What, in your opinion?

A. $103,989.00.

Q. That is for all of the property known as 436, is that right? A. That is correct.

Q. Confine yourself to the portion that is known as Tract "D", or makai of the highway, 100 and some acres, what, in your opinion, was the fair and reasonable market value of that portion of the property?

A. That portion of the property which lies on the southerly side of Puuloa Road, and which contains an area [260] of 192.956 acres, the value is $78,706.00.

Q. Did you attempt to distinguish or differen-

(Testimony of Vincent Fernandes.)

tiate between various portions of that parcel of land?

A. I did. I also zoned 200 feet below the road and in the portion of the area toward Hickam Field I gave it a valuation of 1-1/4 cents a square foot, or $544.50 per acre, and the remainder along that 200-foot zone, 1-cent a square foot, or $435.00 per acre.

Q. Do you want to step down to this large map, Government's Exhibit "A", and show that?

A. (Indicating areas on Government's Exhibit "A") The portion covered by suit No. 436 lying makai or on the southerly side of Puuloa Road extends from its Ewa boundary along the property referred to in Suit 434, and then extends in an Easterly direction toward Honolulu for a distance of 4342 feet, and that area in there, extending back for a distance of 2,047 feet on the Ewa boundary and a lesser depth, or 1469 feet on the Honolulu boundary, contains an area of 192.956 acres. I zoned the first 200 feet from the road running parallel with the road and then took the portion of the area toward Hickam Field, or Ewa, and gave that 1-1/4 cent per square foot.

Q. You are indicating now the portion toward Hickam Field, you are referring to that portion which is Ewa of the intersection of the Pearl Harbor, Hickam Field and Schofield road, is that right?

A. That is correct.

(Testimony of Vincent Fernandes.)

Q. Just mark that, if you will with an X, so we will know the boundary is there somewhere.

A. (Witness does so.) [261]

Q. That is the portion you are talking about as having a value of 1-1/4 cents a square foot?

A. That is correct.

Q. With respect to the property which is toward Honolulu on that center boundary?

A. That portion of the property I gave a value of 1-cent a square foot or $435.60 per acre.

Q. At that point the traffic swings off, is that correct? A. That is correct.

Q. With respect to the remaining portion of the property, do you ascribe any value to that per acre?

A. Yes, $400.00 per acre for the remainder of the property.

Q. Considering the property across the road, which is sometimes spoken of as the lower lot, in 436, what, in your opinion, is the fair and reasonable value of that property?

A. That property contains an area of 61.512 acres, valuation $25,283.00.

Q. How did you apportion that valuation, and give your reasons for it?

A. I took the corner of the lower end, at the distribution of traffic toward Schofield and traffic, of course, of the railroad makai over Puuloa Road toward the Navy Yard, gave that a valuation of 2-cents a square foot for an area of approximately

(Testimony of Vincent Fernandes.)

half an acre. Then I took the remainder of the property fronting on the highway for about 200 feet, gave that a valuation of a cent a square foot, or $435.00 an acre, and took the remainder of the property in the rear and mauka of the Oahu Railway right-of-way and gave that $400.00 an acre.

[262]

Q. I notice you didn't ascribe any frontage value to the makai side of that tract, is that right?

A. The reason for that is because of the Oahu Railway right-of-way that runs along parallel with that property.

Q. At the tip of that triangle, facing into the intersection of the two roads, is there a portion that belongs to the Territory of Hawaii and used for park purposes?

A. That is correct, that is the tip I just marked X.

Q. The part you are referring to as having the 2-cent valuation at the point of intersection is back of that?

A. That is correct, within the parcel.

Q. Did you consider in relation to these tracts the productivity that had been had? A. Yes.

Q. Used that as one of the factors?

A. Yes.

Q. You had access to the records of the Honolulu Plantation Company? A. Yes, I did.

Q. You were familiar with the estimate made for the year 1940-41, is that right? A. Yes.

(Testimony of Vincent Fernandes.)

Q. You had the same information with respect to that that was given to Mr. Crozier?

A. Yes, I went to the Plantation with Mr. Crozier at various times.

Q. You took that into consideration?

A. I did.

Q. You also took into consideration the general location of this property with respect to other lands?

[263]

A. I did.

Q. And other activities? A. I did.

Q. In your opinion the valuation you have given reflects all these elements as far as it affects this property? A. Yes.

Q. Or these properties? A. Yes.

Mr. Courtney: I think that is all.

Cross Examination

Questions by Judge Robertson:

Q. In arriving at your opinion as to the values, Mr. Fernandes, you collaborated and worked together with Mr. Crozier, did you?

A. I did a good deal.

Q. So that reason of that collaboration you both reached the same result? A. That is right.

Q. And in reaching that result you took into consideration what a willing buyer would have paid to a willing seller for that land in November, 1940?

A. That is correct.

Q. Referring to the gore lot, Lot "D" I think

(Testimony of Vincent Fernandes.)

it is called, I think you said there was a half acre there at the junction that you put a valuation of 2-cents a square foot on? A. Yes.

Q. Is that the highest value of that lot "D"?

A. At that time, yes. [264]

Q. Why did you differentiate that tip at the gore from the rest of that 61-acre area?

A. Because of the distribution of traffic for one thing.

Q. Traffic going along the highway proceeding Ewa and the traffic that would cross to Puuloa Road a willing buyer would be justified to take that and give it consideration, would he not?

A. On the assumption that that would be a factor that a willing buyer would take into consideration it is possible that he would pay a trifle more for that.

Q. Why?

A. Because of the gore and the traffic that passes by.

Q. What has passing traffic have to do with the value of that tip at the gore?

A. Passing traffic and pedestrian traffic creates demand.

Q. And in your opinion a demand caused by the passing traffic would raise the value of the lot?

A. Well, a trifle better, the possibilities are a trifle better there.

Q. Better in what respect, better for what purpose?

(Testimony of Vincent Fernandes.)

A. Like the zoning of the remainder along the highway being better than the area fronting on the railroad.

Q. In your opinion a willing buyer would not regard that tip as cane land, would he?

A. He could disregard that, but he would have to take into consideration the demand and the other areas available for the very same purpose.

Q. That is the reason you give to that valuation of [265] 2-cents a square foot? A. Two cents.

Q. Then you speak of demand a willing buyer would have in mind,—demand for what?

A. If there was no other areas available that demand would vary. It has always been the practice that in any piece of property fronting on roads, such as this, that the entire area does not carry the same valuation, and this is one case where I felt that the area along the highway was worth a cent a square foot, or $435.60 an acre, but a slightly increased valuation to the gore lot due to the crossing of the traffic at that point.

Q. When you say gore lot you mean the tip of the gore lot? A. Yes.

Q. Or do you mean the whole 61½ acres?

A. The tip of the gore lot, and then I take an average over the whole.

Q. Wait a minute,—the willing buyer in deciding what he would be willing to pay the owner for the 61½ acre area, he wouldn't value that tip at the junction there at 2 cents a square foot for cane land, would he?

(Testimony of Vincent Fernandes.)

A. Well, he would be justified in paying that for cane land with future possibilities. He would have to weigh that very carefully. He would have to take into consideration all these lots right at the entrance of Pearl Harbor.

Q. Two cents a square foot would be how much an acre? A. $871.20.

Q. Do you mean to say that the willing buyer in [266] November, 1940, would have been willing to pay $871.20 an acre for cane land?

A. Subject to the lease and conditions, yes, that is my opinion.

Q. If that 61½ acres is worth to a willing buyer $871.00 an acre as cane land, why do you put a valuation of $400.00 an acre on it?

A. I want to correct myself. I believe in the question before that I was referring to the gore and not to the entire area when I stated $871.20. I was referring to the 2-cents a square foot for the gore lot that has an area of 0.512 acres.

Q. Exactly. I was referring to the same thing. Now, this willing buyer that was deciding what he would pay the owner for the 61½ acre tract in November, 1940, you said he would be willing to pay $871.20 an acre for the tip of the lot "D"?

A. For that portion yes, but that $861 or $871 was not for the remainder, it is for that one-half acre only.

Q. I will ask you again: That willing buyer in November, 1940 wouldn't have been willing to

(Testimony of Vincent Fernandes.)

pay $871 an acre for any portion of Lot "D" as mere cane land, would he? A. No.

Q. I will ask you again for what purpose would the willing buyer have been willing to pay $871.20 an acre for the tip of the lot at that time?

A. Just because of its location.

Q. Its location for what?

A. For the present use, or some future possible use,—potential use. [267]

Q. You have already stated, Mr. Fernandes, that that willing buyer would not have paid $871.20 an acre for cane land, have you not?

A. That is correct.

Q. And what purpose would the willing buyer have in mind in November, 1940, when he would be willing to pay $871.20 an acre for the tip of Lot "D"? A. Some future potential use.

Q. Potential use of what kind?

A. It would all depend on what would transpire. He would have to take a chance in the Government expanding its area; the Government restricting the use of the property close to Pearl Harbor and Hickam Field, and take a chance in that other areas within the location from being developed.

Q. Developed for what purpose?

A. For other uses if the demand would present itself.

Q. Other uses such as what?

A. Such as house lots or farm lots.

(Testimony of Vincent Fernandes.)

Q. In other words, when you have been referring to a demand for portions of this Lot "D", which the willing buyer would have in mind when he made his offer to the owner, those demands were for house lots, were they not?

A. No. No, I put a valuation on that property as cane land, its highest and best use, but gave a slightly greater value on the lot bordering on the street as an increment value for some future use.

Q. Mr. Fernandes, you have stated that the willing buyer would not have paid $871.20 an acre for that land as cane land, have you not, or do you want to take that [268] statement back now?

A. He would pay that price for that area as cane land subject to the lease and future potential use; he would be justified to pay that.

Q. You are talking of cane land because in November, 1940 that area was planted in cane, is that it? A. Correct.

Q. That lease would expire when?

A. December 31, 1943.

Q. And the willing buyer would bear that fact in mind when he made the offer to the owner?

A. That would be one of the factors.

Q. That lease would be one of the factors which the willing buyer would consider?

A. That is correct; that is one of the factors.

Q. Under those circumstances he would not have been willing to pay the Damon Estate $871.20 an acre for any cane land in that section, would he?

(Testimony of Vincent Fernandes.)

A. No, other than this one-half acre.

Q. I understand you to mean that that, if correct, would be regarded by the willing buyer as being of more value than mere cane land?

A. He would be justified in looking at it in that way, yes.

Q. In looking at it in that way, to meet a demand for what?

A. A demand that when the lease expires there may be some other use.

Q. What other use?

A. If the demand would present itself, use for little [269] house lots, or to continue it along in sugar, in the planting of cane until some time in the future there may be a demand; he will also take that into consideration.

Q. I am obliged to ask you again, Mr. Fernandes, do you mean to say that a willing buyer in November, 1940 would have been willing to pay the Damon Estate $871.20 an acre for any cane land?

A. Restricting it to that area, that is my opinion.

Q. What do you mean by restricting it to that area?

A. To that one-half acre in the gore lot.

Q. Do you mean to tell us that a willing buyer in November, 1940 would have been willing to pay the Damon Estate $871.00 an acre for cane land in the gore lot, which is also called Lot "D"?

A. No. I have already stated that he would be

(Testimony of Vincent Fernandes.)

justified in paying 2-cents for the one-half acre in the gore lot, 1-cent for the 200-foot zone along the highway, and $400.00 an acre for the remainder fronting along the Oahu Railway right-of-way.

Q. Can you make any more definite statement for your reasons that what you have already made, Mr. Fernandes?

A. I have, in arriving at that valuation, taken the uses to which these properties have been put for a period of many years; taken into consideration that Pearl Harbor and Hickam Field existed in that locality for many years; taken into consideration that there is considerable area owned by the same estate along and contiguous to this property, both along Puuloa Road and the mauka side of the highway. All of these factors have to be weighed in arriving at the valuation. [270]

Q. Mr. Fernandes, this willing buyer in November of 1940 would have been willing to pay the Damon Estate $871.00 an acre for a portion of this lot because it had a better and more profitable use than for cane raising, isn't that the reason?

A. If that use actually existed there is a slight advantage to that portion of the area.

Judge Robertson: Will you read the question again, Miss Reporter.

(Thereupon the Reporter read the question as above recorded.)

A. Taking into consideration the life of the lease and of the conditions lined up at that time. I know

(Testimony of Vincent Fernandes.)

this, that we are not going through normal times and anything may happen and these things have to be weighed in arriving at valuations, and further, the demand for the area, or the amount of area that is available for such uses that may present itself at the proper time.

Q. All right, so much for this $871.00 an acre piece. That 200-foot strip bordering on Kamehameha Highway you valued at $35.00 an acre more than you did the cane land *are,* didn't you?

A. A portion and a portion a little higher.

Q. Haven't you run a 200-foot strip from one tip to the other of Lot "D", bordering on Kamehameha Highway that you say is or was worth in November, 1940 $435.00 an acre?

A. I did run a zone 200 feet for the full frontage, which happens to be 4342 feet, and I took the portion of the 200-foot zone on the Ewa side at 1-1/4 cents and the [271] remainder on the mauka side at $431. an acre.

Q. I don't know what you mean by Ewa side, Mr. Fernandes, in this area of the gore lot, which is Lot "D" on the map here (indicating Government's Exhibit "A") haven't you stated that you put a valuation of 1-cent a square foot on a 200-foot strip running from the mauka tip to the junction tip along Kamehameha Highway?

Witness: Can I go to the Map, Your Honor?

The Court: Yes.

(Testimony of Vincent Fernandes.)

A. In referring to this Lot "D"?

Q. Yes.

A. I say yes to that question of yours. I thought you had arrived at the lower end where we had Lot "B".

Q. On the contrary, Mr. Fernandes, I am referring to Lot "D", which is also called the gore lot in Case 436?

A. Lot "D" is the triangle or gore lot lying between the highway and Puuloa Road,—after taking the half acre at the triangle corner here I ran a 200-foot zone at a cent a square foot here (witness indicates a point on Government's Exhibit "A"). When I referred to 1-1/4 cents I jumped below here.

Q. Please don't do any more jumping.

A. I am sorry.

Q. Now, Mr. Fernandes, why would the willing buyer in November, 1940 have been willing to pay the Damon Estate $35.00 an acre more for that 200-foot strip than he would have been willing to pay for the rest at what you call the cane rate?

A. Because of its proximity to the road.

Q. It borders right along the road, doesn't it?

[272]

A. That is correct.

Q. For that reason, in your opinion, it had a slightly higher value than mere cane land?

A. No, not for cane land, but for any increment

(Testimony of Vincent Fernandes.)

value for some future use and taking the lease into consideration.

Q. You evidently didn't give any consideration to future use for the rest of the area on which you put a valuation of $400.00 an acre?

A. In the rear of the 200-foot zone I did not.

Q. You think that area had no hope in posterity?

A. I say that the best use of those lands in cane areas.

Q. For which a buyer would pay $871.00 an acre?

A. For the small triangular piece, but not for the whole lot.

Q. You have already explained, Mr. Fernandes, that that tip of the gore lot there had a potential value in excess of cane land, have you not?

A. A willing buyer would be justified in paying a little bit more on account of its location even if it is cane land.

Q. Location and future demand?

A. Taking into consideration conditions and available area for the same uses.

Q. And would you include future probable demand?

A. That all can be taken into consideration,—it is a hard thing to measure.

Q. I am trying to find out, Mr. Fernandes, why a willing buyer would have been prepared to pay $871.00 an acre for a portion of this area?

(Testimony of Vincent Fernandes.)

A. I believe I have already answered that. [273]

Q. Why would a willing buyer have been willing to pay 1-cent a square foot for the 200-foot strip bordering on the highway?

A. Because of the same possibilities and its proximity to the road.

Q. Because a willing buyer would consider that that 200-foot strip had a higher and better value than the remaining cane land area?

A. For future possible uses perhaps.

Q. And by future possible use what have you in mind, house lots? A. Yes.

Q. In other words, when that lease should expire on December 31, 1943, the willing buyer, then being in complete possession of the area, could put that 200-foot strip on the market in the shape of house lots, couldn't he?

A. If the demand required he could.

Q. In your judgment there would be a demand, would there not? A. I am not so sure.

Q. Would the willing buyer take into consideration the probability of that demand?

A. He would be justified to do that, yes.

Q. So that that element did enter into the market value of this land as of November, 1940?

A. I would say, yes.

Judge Robertson: That is all.

Mr. Courtney: That is all, Mr. Fernandes. I have some photographs here which I have exhibited to

counsel. I hoped that we might be able to stipulate that they be [274] received in evidence. I thought in that way we might obviate the necessity of much formal proof. I merely wanted to show the condition of the ground without the development we observed there on our view yesterday. However, we do not seem to be able to come to an agreement on that score, so I would like to rest conditionally. If it is necessary to call the photographer and go through with formal proof I shall have to do that. I don't like to take the time of the Court or the jury or counsel in formal proof of that character, which doesn't serve much of a useful purpose.

Judge Robertson: I don't see the occasion for all this; we have no more desire to take up the time of Court and counsel and the jury than Mr. Courtney does. Mr. Courtney submitted to us a bunch of photographs that were supposed to be numbered with a key map showing the corresponding numbers. In other words, the map would indicate where the pictures were taken. The map contains a date of January 14, 1941. There is no date given on most of these photographs, but on five of them the date is given as December 26, 1940. Those five are clearly marked, the rest of this bunch, Your Honor, would take a magnifying glass to find any designating number on them. If the remainder of these photographs are clearly and distinctly marked as the first five have been marked then the jury in looking at the photographs and comparing them with the key map could see where they were taken, and if

counsel will have the rest of these photographs numbered as the first five have been numbered so we can see where the corresponding number on the map is we have no objection to their introduction, although strictly speaking they are not admissible. These [275] pictures were taken subsequent to the filing of this suit and about two months after the United States Government had been in possession, consequently these photographs do not show the condition of the land at the time of the condemnation, but they show the condition of the land two months after the Navy had been in occupation of the land. We do not raise any technical point as to that, we are willing that the photographs go into evidence for what they may be worth if and when they are properly numbered to correspond with the map.

Mr. Courtney: I asked to rest conditionally; I want to meet all of the requirements in regard to these photographs.

The Court: You rested conditionally. We will take a recess at this time.

Mr. Courtney: The Government has rested conditionally, subject to introducing these photographs at a later time.

Judge Robertson: With the exception of offering the photographs?

Mr. Courtney: Yes.

Judge Robertson: If Your Honor please, I have not had any of my witnesses in attendance; I didn't think the Government would rest so promptly. May

the case go over until 9:00 o'clock tomorrow morning when I will have all of my witnesses here.

The Court: That will be all right. In the meantime can you endeavor to get any differences which may exist adjusted as to the photographs?

Judge Robertson: If counsel will have them numbered so as to dovetail in with the key map, that is the point I am driving at. [276]

Mr. Courtney: That will be done.

The Court: Very well. Court will adjourn until 9:00 o'clock tomorrow morning.

(Adjourned: 11:27 o'clock a.m.) [277]

On Thursday, the 24th day of July, 1941, at 9:05 o'clock a. m., all parties being present in the courtroom, the following further proceedings were had:

The Clerk: Civil Numbers 434 and 436. Cases called for further trial.

The Court: The jury is present and in the box.

Judge Robertson: I might say just a word to the jury, Your Honor. As you have already been told more than once your functions as jurors in these cases is to fix the value to be paid to the Damon Estate by the Government for the taking of these 331 acres of land. You have heard the testimony of the two so-called experts for the Government in which they stated that except for a 200-foot strip fronting on the highway they see nothing in that land or in that area but cane land. It is at that

point that we split absolutely with the Government's theory. Our contention is that that locality has outgrown its category as cane land and has become residence property and is residence property, ready and potentially available in November, 1940, and that this land was not to be valued at so many acres of mere cane land at all but as so many acres of potential residence property, and that, of course, makes a tremendous difference in the value of the land and the amount to be paid to the Damon Estate by the Government for the taking of those 331 acres,—not 331 acres of cane land but 331 acres of potential residence property. Mr. Castro will you take the stand please.

A. D. CASTRO

being first duly sworn as a witness for the defendants testified as follows: [278]

Direct Examination

Questions by Judge Robertson:

Q. Will you state your name, please?

A. A. D. Castro.

Q. Do you live in Honolulu? A. Yes, Sir.

Q. How long have you lived in Honolulu?

A. I have lived in Honolulu since 1897. Prior to that I was raised on the Island of Maui.

Q. What is your line of business, Mr. Castro?

A. I am engaged in buying and selling real estate for clients, development of real estate, insurance agencies and brokerage business engaging in securities.

(Testimony of A. D. Castro.)

Q. How long has your experience in dealing in real estate and handling real estate existed?

A. I began dealing in real estate and administering real estate interests in 1905.

Q. Are you still in that line of business?

A. I am, Sir.

Q. Do you hold any Government position in connection with real estate?

A. Yes Sir, I am Chairman of the Public Land Board.

Q. That is the Territorial Land Board?

A. Yes Sir.

Q. How long have you been connected with that Land Board?

A. I was first connected with it for seventeen years, then I was out of it for five years and recently the Governor asked me to accept reappointment, which I did.

Q. What does the Territorial Land Board have to do with lands?

A. The Public Land Board under the Organic Act passes upon all Government leases and sales, also exchange of [279] of public lands for other lands for public purposes.

Q. In doing that work does the Land Board from time to time have to determine the value of land?

A. The Land Board passes upon every recommendation made by the Commissioner and every

(Testimony of A. D. Castro.)

offer made by citizens or business entities for the purchase or lease of public lands.

Q. The jurisdiction of the Land Board is throughout the Territory, is it not?

A. Yes Sir.

Q. Including this Island? A. Yes Sir.

Q. At the request of the Trustees of the Damon Estate have you examined the lands at Moanalua that are involved in these proceedings?

A. I have, Sir.

Q. Have you familiarized yourself with those area? A. I have, Sir.

Q. What is the total area involved here?

A. The aggregate area is 331.756 acres.

Q. Call your attention to a map that is on the board here, Mr. Castro, and ask you if you have seen a map like this before,—can you see it from where you are or will you come down here?

A. I have seen it, Sir.

Judge Robertson: This is Exhibit "A", Mr. Clerk?

The Clerk: Yes Sir.

Q. Are those 331 acres all in one parcel or are they separated for the purposes of this case into more than one parcel?

A. They are considered three parcels.

Q. What are those three parcels, Mr. Castro?

[280]

A. One parcel is known as Lot "D", otherwise

(Testimony of A. D. Castro.)

known as the gore lot, which contains an area of 61.512 acres.

Q. That parcel is mauka of the Boulevard, is it not?

A. Yes Sir, it is situated between Kamehameha Highway, the old Puuloa Road and Pearl Harbor Road.

Q. Where are the other areas?

A. There is an area known as Lot C-1 and Lot C-2 containing 77.288 acres, and that is adjoining Hickam Field.

Q. That is the area adjoining Hickam Field?

A. Yes Sir, marked on this map C-1.

Q. And the third area is where?

A. The third area is East of that, towards town, known as Lot C-3-A C-B-1 and C-3-B 2-A.

Q. The aggregate area is how many acres?

A. The area of that parcel is 192.956 acres.

Q. Prior to November, 1940 do you know what those areas were being used for?

A. Yes Sir.

Q. What?

A. For the growing of sugar cane.

Q. What, in your opinion, is the highest, best and most profitable use to which those areas were adaptable as of November, 1940?

A. There are various economic uses to which the land as a whole is adapted, and the principal use, I would say, is for home, second for truck gardening. In connection with the homes there is

(Testimony of A. D. Castro.)

opportunity there for stores. I would say that the principal economic use of the land, that the land is adapted to, is first residence, and second, truck gardening, and that in connection with the use for homes there was opportunity there and there is [281] for small businesses; places of recreation and places for assembling plants in connection with the business and enterprises of Honolulu.

Q. You speak of areas for truck gardening, what rental does truck gardening area command?

Mr. Courtney: Objected to as incompetent and immaterial, Your Honor, too indefinite, remote, speculative.

The Court: Overruled.

A. For truck gardening purposes the land is worth $33.58 per acre per annum,—the average rental per annum is $33.58 per acre.

Q. When you mention truck gardening, what do you include?

A. I would include areas back of strips fronting the highway.

Q. I mean it the other way, truck gardening contemplates the raising of what?

A. Truck gardening contemplates the raising of vegetables that the community is in great need of, raising of poultry, and small farms consisting of one or two acres which would involve raising perhaps of seasonal things for the market.

Q. Would that include vegetables?

(Testimony of A. D. Castro.)

A. Yes.

Q. Fruit? A. No fruit.

Q. How about papayas?

A. Oh Yes, you may class papayas as fruit, as a seasonal product.

Q. How about flowers for the market?

A. That would include that.

Q. When you say that the rental value of lands in this [282] vicinity for that purpose is as you have stated $33.50——

A. It would average $33.58 per acre per annum.

Q. When you say the average rental, between what limits would you say such limits would run?

A. 40; 35; 30.

Q. Let's take up for consideration, Mr. Castro, Lot "D", the gore lot? A. Yes Sir.

Q. From your examination of the situation, quality and capacity of that land, what, in your opinion, was that area worth in November, 1940? When I say 'value' I mean 'market value', which in turn is described as what a willing buyer would pay to a willing seller in money.

A. The market value of that land on November, 1940, on condition that it would be available in April or May of 1941, was, in my opinion, $79,311.75.

Q. Will you state to the jury your reasons for that conclusion, Mr. Castro?

A. Yes Sir. In the first place that parcel of land as a whole,—may I stand up please, it bothers me sitting down, it holds my voice back,—commands

(Testimony of A. D. Castro.)

an average rental value per annum, that is the average rental value covering the whole of $51.57.

Mr. Courtney: May it be understood that our objection runs to all evidence tending to fix the market value in this way. We object to any evidence attempting to work back from the so-called average rental value.

The Court: This is the witness' explanation of his reasoning, his deduction and conclusion by working it out as to its rental value. Objection overruled.

Mr. Courtney: I wanted to be sure the record is [283] preserved. I objected to the previous testimony on this subject; we are now going across the road. I wanted to be sure it was covered.

A. (Continuing): On the basis of that average rental of $51.57 per acre, the total annual rental for that parcel to any buyer would be $3,172.47. In other words, the land can be leased for that rental giving opportunity to the holder of the lase, providing the lease is not less than twenty years, to develop the land and make substantial annual profits on the basis of that rent capitalized on the basis of the value of money today.

Mr. Courtney: I likewise object to that as incompetent, Your Honor.

The Court: I think it is not incompetent if the witness stated what the estimated value of money today is. Overruled.

Mr. Courtney: At this time, because of the uncertainty in the Federal Rules of Procedure, I

(Testimony of A. D. Castro.)

should like to ask counsel to stipulate and the Court to rule that it is unnecessary to repeat the word "Exception" whenever and if any objection is overruled, as would be required under the old rule. There seems to be some little uncertainty as to whether the new rules as to actual trial procedure apply. In the former case we entered into a stipulation and the Court ruled that it was unnecessary for either party to repeat the perfectly useless and vexatious word "Exception" when a ruling is made.

The Court: Unless there is objection, Judge Robertson, the Court will rule that it isn't necessary. [284]

Judge Robertson: That is perfectly agreeable to me, Your Honor. Legislatures keep making new rules for us, but the new rules are generally worse than the old ones, and I am not at all surprised that counsel finds vagueness in the new rules. I have no objection to omitting the word "Exception" and letting the record merely show objections; that will be satisfactory to me.

The Court: It carries the right of exception.

Judge Robertson: Yes.

The Court: The new rules, as I understand, do not apply to condemnation proceedings.

Mr. Courtney: I wanted to be sure the record was preserved.

Q. You were about to state what money was worth, Mr. Castro?

(Testimony of A. D. Castro.)

A. It is my opinion that that class of income should be capitalized at the rate of 4% per annum, a return at the rate of 4% per annum, because of the nature of the lease or the renting of the property,—the certainty of the income would be pretty well established, and on the basis of that rate the value of the whole of that parcel, in my opinion, is $79,311.75. That is the value based on income that the land is capable of yielding, net income I would say.

Q. In expressing that opinion have you taken into consideration all the elements and factors that a willing buyer would have in mind at that time?

A. I have.

Q. In other words, a willing buyer could have made a good investment at that figure? [285]

A. Yes Sir.

Q. You have made a general statement that the area involved in this case would include residence property as well as truck gardening, does that statement apply to the gore lot? A. Yes Sir.

Q. You have also mentioned business property, would that element apply to the gore lot?

A. To part of it, Sir.

Q. What part of the gore lot would you regard as potential business property in November, 1940?

A. At the extreme easterly end and the extreme Westerly end.

Q. By the extreme easterly end you refer to that portion of the lot at the junction of the two

(Testimony of A. D. Castro.)

highways? A. Yes Sir.

Q. I don't see any North marked on this map,—this (indicating on Government's Exhibit "A") would be the Easterly end?

A. Yes. That triangle there would involve an area of 48,000 square feet.

Q. That corner is between the junction of the two highways, is it not? A. Yes Sir.

Q. You spoke of another locality in Lot "D" as being potential business property, where is that?

A. At the corner of Pearl Harbor Road and the Old Puuloa Road.

Q. That would be in the left-hand corner as shown on this map (indicating Government's Exhibit "A")?

A. It is the right going West toward Pearl Harbor. [286]

Q. As shown on this map it would be the mauka corner of the Puuloa Road and the adjoining boundary of the United States Military Reservation?

A. Puuloa Road and Pearl Harbor Road.

Q. Are there two roads along here?

A. One road and a railroad reservation.

Q. When you say Puuloa Road, what are you referring to?

A. The road on the Westerly line along the land toward mauka on the ewa side.

Q. Isn't that also Dillingham Boulevard?

The Court: Perhaps you had better step to the

(Testimony of A. D. Castro.)

map; there is a pointer lying there at the base of the stand.

(Witness does so.)

Witness: On the map here is Dillingham Boulevard.

Q. Where does that go?

A. Pearl Harbor Road begins here, goes toward the Navy Yard. (Witness indicates a point on Government's Exhibit "A".)

Q. When you say "here" you are referring now to the point where the two highways come together at the junction, do you not?

A. Yes sir, the junction of the highway and Pearl Harbor Road.

Q. Dillingham Boulevard ends at that point, is that it? A. That is my understanding.

Q. From there on that continuation of the highway is called Puuloa Road?

A. Pearl Harbor Road runs along the westerly boundary of this land.

Q. Puuloa Road comes down from Kamehameha Highway to the——

A. Puuloa Road comes down from the old Government Road [287] from Aiea.

Q. Comes down from mauka and joins the Pearl Harbor Road?

A. Yes sir, down by the water there.

Q. It is those corners of Lot "D" that you consider potential business property, is that it?

A. Adapted to business at this time.

(Testimony of A. D. Castro.)

Q. This time, do you mean November 1940?

A. November 1940 subject to availability in April or May of 1941.

Q. Let us next take up, Mr. Castro, the 192-acre area, which is also a part of Case No. 436, what have you to say as to the character and suitability of that area?

A. The land as a whole is adaptable to various economic uses. It is an extremely desirable location for small homes, and there is opportunity there for one or two places of business and assembling plants, and for the time being land that would not be utilized for the purpose of homes could be used profitably for truck gardening, flower raising, and, perhaps, what we call domestic farming, small farming.

Q. What was the best and most profitable use, in your opinion, for that area of land as of November, 1940?

A. As I have said the best and most profitable use, in my opinion, was first homes, second, small business, assembling plants, warehouses spaces and truck gardening, flower raising.

Q. In your opinion could that area in November, 1940 be properly regarded as so much cane land?

A. There is no question about its being extraordinarily good cane land, but it is my opinion that it was used as [288] cane land then because of a prior lease that existed and was to terminate in December, 1943. The fact that cane was growing

(Testimony of A. D. Castro.)

there then does not alter my opinion as to the other economic uses that are more profitable to the land, to the ownership of the land.

Q. In other words, in your judgment it had outgrown the category of mere cane land?

A. That is my opinion, sir.

Q. In your investigation and consideration of these matters did you form an opinion as to the market value of that 192-acre tract?

A. I did.

Q. What was that value?

A. The value based on the earning capacity of the land and based on general conditions and various other conditions, such as its proximity to the center of the City, the fact that that is a portion of a region of land which in my opinion is one of the best future available areas for the expansion of this City, was worth $227,572.50, based on an average value of $1,179.40 per acre, and this value per acre is based on the average rental value of that land of $47.176 per acre.

Mr. Courtney: On the basis of the testimony so far given, I move to strike the evidence of the witness upon the ground that it is the conclusion of the witness, not based on fair market values, fair cash market values but on what he claims to be the rental value of the property.

Judge Robertson: It is very obvious that the witness is basing his opinion on the elements and factors that a willing buyer would naturally have

(Testimony of A. D. Castro.)

in mind when he made an offer to buy; that includes rental value as well as fee [289] simple value. The buyer might decide to hold them, to lease, might decide to subdivide and sell. That is up to the buyer. The buyer had just as much right to consider rental values in buying as other elements,—it certainly inheres in the value of the property.

The Court: Overruled.

Q. In expressing that opinion of a value of $227,572 for that area, have you taken into consideration all the elements and factors that a willing buyer would naturally take into consideration in making an offer? A. I have.

Mr. Courtney: Objected to as leading and suggestive, Your Honor, calls for a conclusion, what he took into consideration.

The Court: Overruled.

Q. Let us now take up the remaining area, Mr. Castro, the 77 and a fraction acres involved in Case 434, that is the area immediately adjoining Hickam Field, is it not?

A. Yes, on the mauka side of Pearl Harbor Road.

Q. After examining that area and considering all the matters you have referred to, what was your opinion as to the highest, best and most profitable use that that area was adapted to in November 1940?

A. My opinion is that this land is adapted to

(Testimony of A. D. Castro.)

the use of homes, truck gardening, places of recreation, flower raising, etc.

Q. Did you find any potential business site areas in that section?

A. In my opinion a business house should not be established there. It is an ideal place for a church, as suggested to [290] me by a man who engages in missionary work.

Q. In your opinion what would a willing buyer have paid to a willing seller for the 77-acre area in November, 1940?

A. The value of that land, the market value of that land based on its income, that is on the income that is possible, $9,855.43. It is my opinion that the average rental value per acre per annum is $41.25.

Mr. Courtney: Same objection to this; I take it Your Honor will overrule me again.

The Court: Overruled.

A. (Continuing): ——or $3,188.60 per annum. That annual rental on the whole capitalized at the same rate would bring $79,715.43 net, with all charges taken out.

Q. You have referred to these three lands, Mr. Castro, these three areas, as potential home sites, do you know whether or not there was any demand last year for that class of property?

A. The experience of my office, and the experience that has come to me is that if the land was available in November, on November 30th, 1940, at least one-third of it would be absorbed for homes

(Testimony of A. D. Castro.)

because of the demand for land in that section of this City, and at that,—if I may be permitted, the land then subject to a lease that was pending and which was to terminate in December of 1943, would have sold without question in my mind for .02367 per square foot.

Q. Is that involved in the valuation you already stated or does that make some change in your figure? A. It doesn't make any change.

Q. That is simply the rate at which these total figures were computed? [291]

A. Yes, that would be the rate per square foot that people would be interested in. I may say this, if the Court will permit, that because of the large area of those three parcels, the importance of that area as a potential locality for the expansion of Honolulu because of the need of such expansion, the sale of that land as a whole would constitute a proposition that would remove it from the ordinary market, as the market exists in this Territory. It would require special negotiation and systematic and intelligent financing in order to develop the area as a whole into a community section which in a reasonable period of time would be absorbed by the people in the market and made a valuable and important part of the City of Honolulu.

Q. Is that one of the things that a willing buyer would have had in mind at that time?

A. Yes sir.

Q. Speaking generally, what has happened in

(Testimony of A. D. Castro.)

this City of Honolulu, is it growing, shrinking, or what?

A. The City of Honolulu is gradually growing, there is a demand for expansion, but within the last year, the last two years, certain restrictions associated with the development of new home sites have been made by the City which makes it difficult for the small investor to develop new home sites, and the result is that buyers for small homes are going as far as twelve miles beyond this City towards what we call Maunalua, Koko Head, Niu, Palolo, Kilihi, parts down the country, Waianae, and most of those buyers to my knowledge would prefer to be within a distance of six and a half miles from the center of the City, and to my knowledge that section there consisting of that area [292] and adjoining area offers to the City the solution to this problem of systematic expansion for convenience to buyers in relation to their work and daily life in the community.

Judge Robertson: You may cross examine.

Cross Examination

Questions by Mr. Courtney:

Q. Mr. Castro, to get one thing out of the way at a time, how much did you estimate the church on the corner would be able to pay in the way of rent?

A. I estimated that the owner of the land would give the land for church purposes.

(Testimony of A. D. Castro.)

Q. Now Mr. Castro, I understood you to say this, you have just finished saying that the people of this Territory who are irked by the restrictions in Honolulu are moving as far as twelve miles out, is that right?

A. Yes, because it makes it difficult for the creation of new home sites.

Q. That is because of the restrictions in the City of Honolulu? A. Part of it.

Q. You know Puuloa Road and the ewa boundaries of these properties? A. Yes.

Q. I take it that you would consider that there is some restriction of area which is suitable for development? A. There is.

Q. For homes? A. Yes sir.

Q. Now, are you familiar with the lands of the Damon [293] Estate which are located on the mauka side of the highway? A. Yes sir.

Q. The entire ahupuaa of Moanalua belonged at one time to the Damon Estate, did it not?

A. Yes sir.

Q. Through the Will of Bernice Pauahi Bishop to Samuel M. Damon?

A. (No answer by the witness)

Q. How many acres of cane land are there on the maukaside of the road?

A. I couldn't tell you because I didn't check that.

Q. I am going to help you a little if I can, Mr. Castro. I show you an Exhibit, which I have marked

(Testimony of A. D. Castro.)

Government's Exhibit "B", being a map which I have obtained from the Tax Office of this City,—you are familiar with this,—I will ask you to refresh your recollection by looking at this map and tell us the amount of Damon Estate land in cane on the mauka side of the highway between the Honolulu side and the side next to Pearl Harbor,—how many acres of land in there, roughly?

A. I would have to calculate that. What are these marks here (witness indicates certain marks on map marked Government's Exhibit "B").

Q. Those are the marks of fields.

A. But there is no way of my figuring that out because the sections don't give the areas. I will say in connection with such a development every foot of land within a thousand feet from the highway will come within the same category as the lower land.

Q. That is from the boundary which is marked here as Puuloa Road in about the center of the map next to the [294] ponds, is that right?

A. That is right.

Q. And what about the land back of the thousand feet?

A. That would come in in a later development; that would take a longer period of years to develop,—I have particular reference to a reasonable period which such development would fit in.

Q. You are familiar with this map (referring to

(Testimony of A. D. Castro.)

map marked Government's Exhibit "B") and recognize it as something used by your profession?

A. I recognize the map; I am not familiar with the characters indicated there.

Q. Well, roughly, how many miles of frontage is there on the highway?

Judge Robertson: Are you putting that map in evidence, Mr. Courtney?

Mr. Courtney: I will, sir, later.

A. I would say two miles.

Q. Two miles? A. Yes sir.

Q. Two miles from the old Puuloa Road and a depth of 1,000 feet? A. Yes.

Q. There is still land available back of the 1,000 feet, is that right? A. That is right.

Q. That is all being used for sugar cane now?

A. Yes.

Q. Under lease to the Honolulu Plantation Company? A. Except the high levels. [295]

Q. Except the higher levels? A. Yes.

Q. You have no idea of the total acreage there?

A. I have not.

Q. All of that land is available for home sites, is it not?

A. It is available; I would not say it is available, but if the owners would offer it——

Q. It is the Damon Estate? A. Yes.

Q. It can be made available by the owners if they so choose? A. Yes.

Q. If a man paid $1,000.00 an acre for the

(Testimony of A. D. Castro.)

locality with which we are dealing here what would happen to him if the Damon Estate undertook to open up this land on the mauka side of the highway?

A. It wouldn't affect its value at all.

Q. How many homes were built in Honolulu during the last year?

A. To my knowledge 1825 homes.

Q. How many the previous year?

A. My recollection doesn't go back that far.

Q. Would you call last year a very unusual year, Mr. Castro?

A. In building of houses, yes, not in the sale or opening of new tracts.

Q. Don't you know how many houses were built in Honolulu in 1939 or 1938, weren't conditions a little different then? A. I didn't check.

Q. Never concerned you how many houses had been built? [296]

A. Yes it concerned me; I have the figures in my office.

Q. Tell me how many you considered were built on the entire Island of Oahu? A. In 1939?

Q. Yes? A. I would say about 2,000.

Q. About 2,000? A. Yes.

Q. Did you consider that when you were making up your estimate? A. Yes sir.

Q. Those 2,000 were built in 1939 on the entire Island? A. About that.

Q. How many in 1938?

(Testimony of A. D. Castro.)

A. I would say around 1800.

Q. How many in 1937?

A. I couldn't tell you.

Q. As a matter of fact the development of Honolulu is in the other direction from this land, is it not?

A. It is for the time being because land has been opened up on that side.

Q. Bishop Estate has opened up Kahala and Maunalua, is that right? A. Yes sir.

Q. Many houses built out there?

A. Quite a number.

Q. As a matter of fact the first expansion that took place in this direction, that is in the direction of Pearl Harbor, took place on the makai side of the road? A. Yes sir. [297]

Q. And immediately adjacent to the large pond, the Ahuu Pond? A. Yes, on the town side.

Q. Extending out in the direction of Pearl Harbor? A. That is it.

Q. Did you consider the environment of this particular property? A. I did.

Q. Immediately adjoining Wheeler Field?

A. Yes sir.

Q. How far it was from the landing mat?

A. Yes.

Q. Do you know how many planes are regularly quartered at Hickam Field?

A. I don't know and I don't care to know.

(Testimony of A. D. Castro.)

Q. Do you know what the personnel is at Hickam Field, in normal times, the garrison?

A. I do not.

Q. How about the garrison at Pearl Harbor?

A. I have never made inquiries in that respect.

Q. Don't know anything about that?

A. No.

Q. Do you know anything about the landing field on Ford Island?

A. I don't know what the personnel is there.

Q. And the normal complement of aviators leaving and returning to that field? A. No sir.

Q. As a matter of fact, Mr. Castro, the more desirable lands in this whole area are located on the Waikiki side of the Damon Estate, are they not, on the mauka side of [298] the road Waikiki or toward Honolulu?

A. You mean the land mauka of Dillingham Boulevard?

Q. Yes sir?

A. That is considered better land than the land below.

Q. Better land than the land condemned?

A. Yes sir.

Q. The values recede as you leave Honolulu, do they not? A. No they do not.

Q. They remain the same for the purposes of this case, or what? A. They improve.

Q. The farther away you get from Honolulu?

A. Because of the center of activity on the other side.

(Testimony of A. D. Castro.)

Q. What other side?

A. On the Westerly side of this land.

Q. What do you mean, Hickam Field, Pearl Harbor?

A. Hickam Field, Pearl Harbor, Pearl City, the plantations down as far as Waianae.

Q. How large a subdivision is there outside of Schofield Barracks, where we have always had a full division of troops?

A. You mean a private subdivision?

Q. Yes?

A. There is the town of Wahiawa.

Q. What is the population of Wahiawa?

A. The population of Wahiawa is around 5000.

Q. How about the borders of Schofield Barracks, how many stores and business houses have been put up there in the entire time that Schofield Barracks has been garrisoned with a full division of troops?

A. None on private property with the exception of two.

Q. Just two? [299] A. To my knowledge.

Q. Did you ever hear of any of these being marked out of bounds by the Commanding Officer?

A. Yes sir.

Q. Don't you suppose a business man would consider that possibility and that hazard?

A. I don't think so.

Q. What would happen after this emergency was over and the personnel changed?

A. Out of bounds usually applies to places where

(Testimony of A. D. Castro.)

nuisances exist, where the interests of the Post are not fully regarded, but I don't think that would come about.

Q. Did you ever hear out of bounds because of exorbitant rents?

A. Yes sir, that becomes a nuisance.

Q. You know that hazard exists?

A. Not out there to my knowledge.

Q. Don't you know that three years ago the Commandant of the Navy Yard tried to interest private capital in some development to accommodate Navy personnel? A. Yes sir.

Q. You know that? A. Yes sir, I do.

Q. Don't you know they turned it down because the hazard was too great?

A. Not when I was approached.

Q. Not when you were approached?

A. No.

Q. You were perfectly willing to invest your money?

A. Absolutely if I could get the land at that time.

Q. Your entire estimate, you say, is based upon a capital- [309] ization of 4% of rental value?

A. It is based on the capitalization of the annual rental at the rate of 4%, which I consider the value of money, and also upon the fee simple prices that were obtainable at that time.

Q. What fee simple prices and where,—never mind the prices but tell me where?

(Testimony of A. D. Castro.)

A. The prices obtainable.

Q. Tell me where you are referring to fee simple prices? A. In the market.

Q. Where? A. In Honolulu.

Q. Whereabouts in Honolulu?

A. Under the skies and within the center of this City.

Q. Where, what specific area did you consider fee simple value?

A. The parcel "D" as well as the other parcels.

Q. What were you comparing it with?

A. I was comparing it with prices elsewhere.

Q. Where?

A. I compared it with prices at Kuliouou, Woodlawn, Kalihi, Waianae, Waialua, Aiea Heights.

Q. You tell us something about the developers of St. Louis Heights?

A. (No answer by the witness)

Q. Tell us about the recent auction of lots up there?

A. The recent auction of lots, the prices were fair but only to those who would have enough money to develop them, and that would take a considerable sum to clear it off rocks, etc., that condition doesn't exist in any of these areas. [301]

Q. How about the presence of utilities or the absence of utilities?

(Testimony of A. D. Castro.)

A. Water is available, utilities are available, or could be made available.

Q. But all the areas that you are comparing the fee simple with are located in the direction of Koko Head, are they not?

A. Toward there and toward the Westerly direction of the City.

Q. That direction is where the development of Honolulu is, is it not?

A. For the time being until other lands are available on the other side.

Q. Do you regard these times, Mr. Castro, as normal times?

A. I don't regard them as normal times, I regard them as times based on requirements of certain emergencies that exist, but I consider that the normal expansion of the City as it has been established for many years by experience justified my conclusion.

Q. I ask you whether in 1940, due to the development in Honolulu, a purchaser would consider he was dealing in a normal market or with a normal market?

A. I would say he was dealing with a normal market with fair business surrounding him.

Q. Wouldn't have to anticipate any change in the enlargement of Honolulu or reduction in the military or Naval garrisons?

A. To some extent, Yes. The fact that it is a well known policy of the Nation that its posts, mili-

(Testimony of A. D. Castro.)

tary posts, such as we have in Hawaii, will be maintained for many years, that these defenses will be continued to be maintained. [302]

Q. By the way, what was the rental on this property from the Honolulu Plantation Company?

A. The rental under the lease was $23.50 per acre.

Q. Is that an average over the three properties?

A. Yes Sir.

Mr. Courtney: Now I desire to offer in evidence this map which has been marked Government's Exhibit "B", which this witness has referred to, which is a tax map, for relation to his testimony.

Judge Robertson: What does that Exhibit show, Mr. Courtney?

Mr. Courtney: It shows the location of the land on the mauka side of the boundary of the Damon Estate and also shows the extent of their holdings in cane.

Judge Robertson: That is rather indefinite; what is there about this map, Mr. Courtney, that shows the extent of the holdings of the Damon Estate in cane. This map requires some explanation before it is intelligent to the Court or the jury.

Mr. Courtney: I shall supply that.

Judge Robertson: O. K., on that understanding we have no objection.

The Court: It will be received in evidence as Petitioner's Exhibit "B'.

(Testimony of A. D. Castro.)

(Thereupon the map referred to was received in evidence and marked Exhibit "B".)

Mr. Courtney: I would like to exhibit to the jury the map to which the witness has referred; the area to which the witness makes reference on the mauka side of the tracks from the Puuloa Road is the point where my [303] finger is now placed,—do you follow me, Mr. Castro? A. Yes.

Mr. Courtney (continuing): And extending from there to the areas with which we are concerned.

Juror: I am a little confused about this Puuloa Road.

Mr. Courtney: I beg your pardon, the Puuloa Road is marked on this map Exhibit "B" at this point (indicating a point on Government's Exhibit "B").

Juror: I thought Mr. Castro said it went on the Westerly side, is that Puuloa Road?

Mr. Courtney: I will ask Mr. Castro to explain.

Witness: I may say that that map is based on the old boundary,—the Puuloa Road used to begin at Moanalua and go down,—Dillingham Boulevard didn't exist then,—and went to Watertown, then from there up that began at the old Government Road at Aiea and shot right down to Watertown. They haven't changed this Moanalua Road from Puuloa Road; it should be Moanalua Road leading to Dillingham Boulevard.

Juror: In other words, it is the same road?

(Testimony of A. D. Castro.)

Witness: It is the same road; the road on the Westerly side of this land that runs from Pearl Harbor to the old Government Road is also known as Puuloa Road.

Judge Robertson: On the western side of Lot "D", is it?

Witness: Yes.

Mr. Courtney: There are some markings on this map which we will explain at a later time.

Q. (By Mr. Courtney): Now, as a matter of fact, Mr. Castro, don't you know that the Bishop Estate has used 6% [304] for a rate of capitalization,—just answer that question do you know that or not? A. I do.

Q. Answer it if they use it Yes or No?

Judge Robertson: Objected to as incompetent, irrelevant and immaterial, Your Honor. There was a time when everyone used 6% capitalization, but that time has passed out of the picture long ago, we are not dealing now with the horse and buggy days.

The Court: It seems to me that that is irrelevant.

Mr. Courtney: If the witness is permitted to assume a 4% capitalization as the one supposed to be prevailing in the Territory, which I challenge, I think we have a right to ask about the other rates of capitalization since his whole testimony is based on capitalization of assumed rentals. It can be answered.

(Testimony of A. D. Castro.)

The Court: Your examination goes to his reasons as to why he adopted 4%.

Mr. Courtney: No, as to the justification as against practices prevailing in the community.

Judge Robertson: This question, Your Honor, goes out of bounds,—we are not concerned with what the Bishop Estate did at some indefinite and unspecified time. If counsel wants to cross-examine the witness on how he arrived at 4% he is entitled to do that, of course, but what the Bishop Estate has done at some indefinite time is highly irrelevant and immaterial.

Mr. Courtney: It purports to establish the rate of capitalization prevailing in the community. [305]

Judge Robertson: It doesn't do anything of the kind. We are not concerned here with what the Bishop Estate may have done twenty years ago, we are not dealing with ancient history.

The Court: I ruled earlier on that. There is nothing before the Court now. We will take a short recess now.

(Recess—9:15 a. m. to 9:30 a. m.)

Continuation of Cross Examination of
Mr. A. D. Castro

Questions by Mr. Courtney:

Q. Now, Mr. Castro, to go back to our question, —what rate of capitalization does the Bishop Estate use for residential development?

Judge Robertson: Objected to, Your Honor, as incompetent, irrelevant and immaterial, having no

(Testimony of A. D. Castro.)

bearing on the issues in this case and being indefinite as to time.

The Court: Sustained.

Q. As to 1939 and 1940?

Judge Robertson: The same objection, incompetent, irrelevant and immaterial, having no bearing on the issues in this case.

The Court: Sustained.

Mr. Courtney: I would like to make an offer of proof. Does the Court desire me to make it in open Court or into the record?

The Court: You may make it in open Court.

Mr. Courtney: I offer to prove by this witness that this witness knows, and if called upon to testify would state that the rate of capitalization used by the Bishop [306] Estate for rental valuations on residential properties is 6%.

The Court: Offer denied.

Mr. Courtney: I further offer to show in that same connection the extent of the Bishop Estate holdings.

Judge Robertson: Same objection.

The Court: Denied.

Q. Now, Mr. Castro, you have placed a valuation for business purposes on the corner of Puuloa Road, which is located at the point indicated by my pencil, did you not, in excess of the value which you placed on other parts of that property?

A. The value of that parcel is placed, together

(Testimony of A. D. Castro.)

with a strip along the road that would contribute to the success possibility of that business location.

Q. Do you mean a strip along the Ewa side of this gore lot "D"? A. Yes.

Q. Fronting on Puuloa Road?

The Court: The Ewa boundary, what do you mean by that?

Mr. Courtney: I mean this boundary, the boundary nearest Pearl Harbor, nearest the Naval Reservation, is that the one you mean?

A. I consider——

Q. Just answer the question,—do you mean the boundary adjoining the Naval Reservation where the old Puuloa Road came down? A. No.

Q. Where do you mean?

A. I mean a strip along the Pearl Harbor Road from the old [307] Puuloa Road to the junction.

Q. To this point (indicating a point on Government's Exhibit "B")? A. Yes.

Q. Then that is on the makai boundary of this tract? A. Yes Sir.

Q. Don't you know there is the O. R. & L. Railway right-of-way running right along smack along that boundary?

A. I do. When I say Puuloa Road I mean the old private road which was used by the public but controlled by private ownership on the Westerly side of that line.

Q. Come down and show us where that property is.

(Testimony of A. D. Castro.)

A. (Witness does so). The old Puuloa Road came down from this boundary (witness indicates a point on Government's Exhibit "A"), which is the Westerly boundary of lot "D".

Q. Now indicate with the letters "A" and "B" where it started and where it ended?

Judge Robertson: Isn't that the road we drove up yesterday, Mr. Courtney?

Mr. Courtney: In part.

Witness: I may say that the ownership of that road is controlled——

Q. Let's get it down first, I want to know just where that is, mark the letters "A" and "B" at the beginning and at the end, so we will know where it begins and where it ends.

(Witness does so.)

Q. How much value did you put in——

Judge Robertson: Did you mark that "A" and "B"? [308]

The Witness: Yes I did.

Mr. Courtney: So we will know where it begins and where it ends.

Q. How much value did you put in that strip along that boundary between the letters "A" and "B"?

A. The strip reserved for the purpose of residential lots that would contribute to the business section about 16.202 acres of land.

Q. Fronting on the highway?

(Testimony of A. D. Castro.)

A. Fronting on the highway, with a tier, two tiers of lots commencing on the road that would be established 150 feet from the highway.

Q. Let's talk about Puuloa Road that you assume is there, how much value did you put on that strip because of frontage on that road?

A. I placed no value on any strip fronting on that road.

Q. I thought you said you placed a higher value to the road frontage?

A. I gave a higher value to the strip of land running parallel with Pearl Harbor Road.

Q. Mark that on the map "C" and "D" so we will know what you are talking about, where the strip begins and where the strip ends?

(Witness does so.)

Q. How much value did you put in that strip and how deep was the strip?

A. The value put on that strip was $51,177.12.

Q. $51,177.12? A. That is correct. [309]

The Court: I would prefer that figures of value be not put on the Exhibit.

Mr. Courtney: I will take it off.

Q. A strip how deep? A. 340 feet deep.

Q. What value did you put on this strip, between "A" and "B"?

A. I put no value there except putting them together with the remaining area.

Q. What about the portion of the property located between the letters "A" and "B" and running

(Testimony of A. D. Castro.)

along the Schofield Road to the intersection with the Puuloa Road?

A. That is valued together with the remaining area.

Q. So you placed all your increased value on this strip fronting Puuloa Road and the O. R. & L. right-of-way?

A. We placed a valuation on that strip of $51,177.12.

Q. What is the remaining value?

A. The remaining value is $28,134.66.

Q. Now let us take this strip along the makai side of the O. R. & L. right-of-way and Pearl Harbor Road, how much of your valuation is reflected there?

Judge Robertson: The 192 acres, Mr. Courtney?

Mr. Courtney: Yes Sir.

Q. Let us take, first of all, this 77-acre parcel, our Civil 434, how much value did you reflect for that frontage?

A. That frontage will embrace an area of 4.5506 acres.

Q. Tell me how deep it is?

A. 150 feet deep.

Q. 150 feet deep? A. Yes Sir.

Q. All right, and how long? [310]

A. It is 1320 feet long.

Q. How much of your valuation of this parcel was reflected in that strip?

(Testimony of A. D. Castro.)

A. The valuation reflected was $30,865.00.

Q. What in the balance of the parcel?

A. $48,850.43.

Q. That is an estimate of 4-1/2 acres on the frontage? A. Yes sir.

Q. Let's get down to the adjoining piece, did you reflect any increased value on the land fronting Pearl Harbor Road? A. Yes.

Q. If so, how much,—this is Civil No. 436, 192 acres?

A. The area embraced in that strip was 14.979 acres.

Judge Robertson: Of what?

Witness: Of land.

Q. Tell us how deep? A. 150 feet deep.

Q. For what distance?

A. It has a distance of 4,390 feet.

Q. How much value did you reflect in that?

A. $110,042.50.

Q. $110,042.50? A. Yes sir.

Q. In that one strip along this road?

A. Yes sir.

Q. Did you make any distinction between the portions on the Honolulu side of Lot B-1, that is where the road divides? [311]

A. This valuation took the strip as a whole.

Q. You didn't make any distinction between the point at which the road divides going on either side, or on both sides, of the O. R. & L. right-of-way? A. No sir.

(Testimony of A. D. Castro.)

Q. Didn't think there was any difference between those two? A. What two?

Q. Between those two portions of the strip?

A. You mean that front strip and the rear strip?

Q. Between the portions of the strip which are nearest Pearl Harbor and the portions of the strip which approach Honolulu?

A. This is the valuation we placed on that entire strip.

Q. How much is that a square foot?

A. That is .168 per square foot.

Q. You want this court and jury to believe that all of that land is equally valuable, is that it?

A. That is the valuation we applied in an average way.

Q. Is that your opinion of the fair market value of it? A. Yes sir.

Q. Without distinction?

A. Without distinction for the entire strip.

Q. That is based on a capitalization rate of 4%, is that it? A. Yes sir.

Q. The same is true with reference to your valuation for the other property, 4%?

A. Yes sir.

Mr. Courtney: That is all with the witness. [312]

Witness: There is one thing I might explain in this connection, if you will permit me——

(Testimony of A. D. Castro.)

Mr. Courtney: You are very ably represented here and I have finished with you for the time being.

Judge Robertson: You may make that statement.

Mr. Courtney: I submit we are entitled to have a question so we can determine whether the evidence is material or not.

Judge Robertson: The witness has expressed a desire to make an explanatory remark as to his evidence, which every witness has the right to do. My idea is to give the witness an opportunity to say what he has in mind.

The Court: Is there any objection?

Mr. Courtney: I would simply like to know what the question is.

The Court: It is an explanation he wants to make.

Mr. Courtney: Of what?

Witness: Relating to the determination of rates, rates of interest.

Mr. Courtney: I don't think that is material. I asked only one question about rates, that is what he used and what the Bishop Estate used.

Judge Robertson: As I said before, we are not at all interested in what rate of capitalization the Bishop Estate at some indefinite and undefined time has used, what we are concerned with here is the earning power of money which this witness has said

(Testimony of A. D. Castro.)

was not in excess of 4%. I am willing to let it go at that.

The Court: Mr. Castro, before you leave the stand,—you spoke of the rental value that you had estimated on [313] these various pieces of land and once or twice you said that would be net rental?

Witness: Yes Sir.

The Court: Now, there is some confusion in my mind,—who would pay the taxes under that rate of rental?

Witness: The lessee.

The Court: Who would pay any improvement assessments, if there were any?

The Witness: The lessees.

The Court: In using that word "net" just what did you mean?

Witness: That the rent would be net to the lessor-owner only subject to gross income tax and income taxes to the Government.

The Court: That the land-owner would be free of all charges in connection with the land, is that what you mean?

Witness: Yes, such as real property taxes, cost of construction of roads, water rates and other rates such as electricity, etc.

Mr. Courtney: At this time we move to strike out all of the testimony of this witness on the ground that it is the conclusion of the witness, and on the further ground that the testimony does not reflect the fair market value,—the premise is false.

(Testimony of A. D. Castro.)

The Court: Overruled. Any further examination of the witness?

Judge Robertson: Yes, Your Honor.

Redirect Examination

Questions by Judge Robertson:

Q. Mr. Castro, you have stated on your cross-examination [314] that the expansion of Honolulu, now or heretofore, has been in the opposite direction, in other words, towards the East instead of toward the West, do you know the reason for that tendency?

A. Yes, the class of people, although I don't like to draw any distinction, that has been going toward the Easterly side of this City are of a tendency that would prefer to live on this side, the Easterly side. We have coming into age every year around 5,000 young men and women, and from this group a very large percentage undertake the responsibility of home-owning, and as far as I know their tendency is toward the Westerly side of this City.

Q. Heretofore in what direction, East or West, have most of the subdivisions been opened up for settlement?

A. From say a point in Nuuanu, I would say East, Easterly.

Q. In your opinion does the opening up of subdivided tracts and putting them on the market have something to do with the direction of the tendency of the City to expand? A. Yes Sir.

(Testimony of A. D. Castro.)

Q. In your opinion is the fact that this Moanalua land has been tied up with a plantation lease for several years a factor, has that anything to do with the lack of expansion in a Westerly direction?

Mr. Courtney: That is objected to, Your Honor, as incompetent, vague, remote, contingent.

Judge Robertson: Has a direct bearing on the tendency that counsel referred to on cross-examination.

The Court: Overruled.

A. Yes Sir, without any question. [315]

Q. So that upon the expiration of that lease in 1943 if those areas, or some of them were opened for subdivision and development, would that, in your judgment, have anything to do with the direction of the tendency of the City to expand?

A. It would, Sir.

Q. Are you aware of the fact, Mr. Castro, that heretofore the Damon Estate has subdivided and put on the market various areas at Moanalua?

A. Yes Sir.

Q. In the vicinity of these lands we are talking about? A. Easterly of the lands, Yes.

Q. When you referred to the old Puuloa Road, which you have described as a private road, but open to public traffic on the Westerly side of Lot "D" as adding to the accessibility in case of a subdivision of Lot "D", in taking that into consideration is by virtue of the fact that a willing buyer of

(Testimony of A. D. Castro.)

that area would consider the fact of the existence of that old roadway?

A. I have not stated that road now accessible to that side of the land. I have not considered the availability of that land in the valuations I have worked out.

Q. Possibly I misunderstood one of your answers on cross-examination. Did you on your cross-examination refer to some road as affording accessibility in case of a subdivision of Lot "D"?

A. Yes Sir.

Q. What road was that?

A. That is the road that would be constructed, the two tiers of lots parallel to Pearl Harbor Road, at small expense. [216]

Q. That is a subdivision road that you assume a willing buyer would have in mind, is that it?

A. Yes Sir.

Q. Counsel has made reference to the fact that on the makai side of Lot "D" there is the O. R. & L. right-of-way, what do you consider a willing buyer would have in mind in that connection?

A. A willing buyer would discount that railway right-of-way because he would provide for his purposes a road within the land 150 feet from this railroad.

Mr. Courtney: If the Court please, I move to strike out all of the testimony of this witness on the ground that it is hazarding an opinion, irrelevant, contingent, remote, contentious.

(Testimony of A. D. Castro.)

The Court: Overruled.

Q. When you said that in this area of Lot "D" there would be 16 and a fraction acres of land the market value of which would be $51,177.00, what would a willing buyer have in mind as to the adaptability, or its highest, best and most profitable use of that 16-acre piece?

A. He would have in mind either selling the lots for homes or leasing those lots at a reasonable rent for a period of not less than twenty-five years at a fair rental.

Q. All that means the willing buyer would realize on his investment a fair return?

A. Yes Sir.

Q. As I understand you, that 16-acre area would be put into small house lots, is that it?

A. Lots of not less, because of the location, of 60x150 feet, and that would sell for—— [317]

Mr. Courtney: If the Court please, we object to that as incompetent, being the conclusion of the witness.

Q. Never mind what they might sell for, Mr. Castro—— A. All right.

Q. But in your opinion could a willing buyer have paid that value for that land as an investment where the willing buyer had in mind either selling or leasing? A. Yes Sir.

Q. State whether or not a similar line of reasoning applies, Mr. Castro, to those strips 150 feet deep on the 192-acre area, and also the 77-acre area?

(Testimony of A. D. Castro.)

A. It does, the same reasoning would apply there for immediate realization of those values.

Q. And that line of house lots would have an existing frontage on the highway without any additional road construction, would they not?

A. Yes; there would be a little expense in connection with it.

Q. Does the demand for such property that you have already stated to exist apply to those 150-foot strips? A. To my knowledge it does.

Judge Robertson: That is all.

Recross Examination

Questions by Mr. Courtney:

Q. Mr. Castro, if I understand your testimony now correctly, your value is based upon an assumed subdivision of the three parcels is it not?

A. Not necessarily; could work either way.

Q. In order to arrive at your value of Lot "D" you had to assume the existence of a road, did you not? A. Yes. [318]

Q. That road if placed there would be a private road, would it not?

A. It would eventually be designated to the City.

Q. The City is not obliged to accept it?

A. As a matter of policy it would.

Q. But it is not obliged to accept it?

A. I should say it is when the construction is according to law.

(Testimony of A. D. Castro.)

Q. As a matter of fact don't you know that Puuloa Road, the section of Puuloa Road we have referred to next to the Naval Reservation is Navy property?

A. I have given no thought of value to that road.

Q. You have just cut up these lots on this land and gave them a rental value and then arrived at your total figure, isn't that right?

A. Not in my mind but based on conditions that exist.

Q. Isn't that what you did, you subdivided it and then arrived at your total value?

A. That was one way.

Q. Isn't that what you did?

A. That is one way of determining the value.

Q. Is that what you did? A. Yes sir.

Mr. Courtney: I now move to strike the testimony of the witness on the ground that the same is incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Courtney: That is all.

Redirect Examination

Questions by Judge Robertson: [319]

Q. In stating that was what you did, Mr. Castro, in your opinion would a willing buyer have had a similar idea in his mind?

Mr. Courtney: Objected to, Your Honor, as in-

(Testimony of A. D. Castro.)

competent, irrelevant and immaterial, calling for a conclusion of the witness.

The Court: Overruled.

A. No question, sir.

Judge Robertson: That is all.

Mr. Courtney: No more questions.

The Court: There is some question as to the distance of this land from Honolulu, or some part of Honolulu City proper,—can that be cleared up?

Mr. Courtney: That can be demonstrated. I don't know whether this witness knows the exact distances. We can certainly find out and agree on that I think.

Judge Robertson: Distance from where?

The Court: The distance from this land,—we know how long it is,—now the distance from some well known point in Honolulu, this building for instance.

Mr. Courtney: I think that can be agreed upon without asking this witness to hazard a guess.

Judge Robertson: I don't know whether this witness knows or not, but that could be ascertained from the City Surveyor. Moanalua by law is within the City limits. I presume that is understood. The City of Honolulu is defined as extending from Moanalua to Maunalua inclusive. This land of Moanalua we are talking about here is within the statutory City limits. I don't know how far these areas are from the Post Office but we could find out and [320] and agree on it.

(Testimony of A. D. Castro.)

The Court: There is some testimony, incidental perhaps, by another witness that it was 8 to 9 miles, whereas this witness made some reference to 6 or 6-1/2 miles. I think it should be settled.

Mr. Courtney: If I remember the testimony of this witness correctly, this witness gave the distance of five or six miles from the Puuloa Road boundary, which appears about in the center of this Government Exhibit "B", is that right, Mr. Castro?

Witness: No.

Mr. Courtney: What distance?

Witness: I said the land was approximately six and a half miles from the center of our city, from the Post Office.

Mr. Courtney: 6-1/2 miles from the Post Office to what place?

Witness: To this junction between Pearl Harbor and the Schofield Road.

Judge Robertson: Have you ever had occasion to check that up, Mr. Castro?

Witness: I did not. I must confess that I had my agents do it for me.

Judge Robertson: I expect, Mr. Courtney, we could get together on a stipulation.

Mr. Courtney: I think so. That is all Mr. Castro.

Judge Robertson: Will you take the stand Mr. Harrison, please?

WILFRED E. HARRISON

being first duly sworn as a witness for the defense, testified as follows: [321]

Direct Examination

Questions by Judge Robertson:

Q. State your name, please.

A. Wilfred E. Harrison.

Q. Where do you live? A. Honolulu.

Q. How long have you lived in Honolulu?

A. Practically all my life.

Q. Born here?

A. Born in the Island, yes sir.

Q. What is your occupation?

A. Assistant Vice President of the Bishop Trust Company.

Q. In what particular department of the Trust Company?

A. In the Trust Department handling real estate properties.

Q. How long have you been connected with the Bishop Trust Company? A. Since 1922.

Q. In connection with land matters what does your work involve, what do you do with respect to real estate?

A. I am on the Appraisal Committee, appraising all properties which are pledged under mortgages, mortgage loans.

Q. Does your experience include appraising property for other purposes than mortgage loans?

(Testimony of Wilfred E. Harrison.)

A. Yes sir, I have done that.

Q. Does it include the valuing of property under leasehold? A. Yes sir.

Q. Does that include the valuing of property for the purpose of purchase or sale?

A. Yes it does.

Q. By reason of that sort of work have you become familiar [322] with land values on the Island of Oahu? A. I have.

Q. At the request of the Trustees of the Damon Estate have you made an examination and investigation of the land areas involved in this law suit?

A. I have.

Q. What is the total area involved here?

A. The total area is 331.756 acres.

Q. Situated where?

A. On the Dillingham Boulevard just this side of Pearl Harbor.

Q. What is the name of that land?

A. You mean the title of the land?

Q. Yes? A. It is Moanalua.

Q. In Moanalua? A. Yes.

Q. In the course of your examination and investigation of these areas, what did you find as to the situation of these lands?

A. In my opinion these lands had outgrown the element of cane lands and had become more residential and small farm areas.

Q. You knew that heretofore these areas have been under lease and under cane cultivation?

(Testimony of Wilfred E. Harrison.)

A. I did, yes sir.

Q. What is the basis of your view that these areas had outgrown their category as mere cane land?

A. I noticed the rapid increase in population, the demand for outside areas and the tremendous traffic going to and from the country down that way. [323]

Q. In your opinion what was the highest and best and most profitable use for which these areas were adapted as of November, 1940?

A. For residential and small farm areas.

Q. At that time was there a demand for such areas? A. There had been, yes.

Q. Do you know how long that demand had been continuing?

A. The last four or five years.

Q. What has caused that demand?

A. The increase in population; the fact that the small farmers have difficulty in finding places, —the pig men at Kahala when their leases terminate will have to look elsewhere, and there have been a number of inquiries for lots out that way.

Q. I call your attention first, Mr. Harrison, to Lot "D", sometimes called the gore lot, that triangular area mauka of the highway, lying between the two highways, do you know the area of that lot?

A. 61.512 acres.

Q. What, in your opinion, was the value of that area in November, 1940, considering its market

(Testimony of Wilfred E. Harrison.)

value which for present purposes means a price that a willing buyer would pay to a willing seller in money? A. $63,449.43.

Q. For what purpose or purposes was that lot adaptable in November, 1940?

A. For residence lots and small farm areas.

Q. Does this demand that you have stated you know to exist include both this category of residence property as well as small farming?

A. Yes it does. [324]

Q. When you say that in your opinion Lot "D" is adapted to that purpose, do you mean one or the other, or a combination of both?

A. A combination of both.

Q. Are you now stating what you believe a willing buyer would have in mind in buying the property? A. Yes sir.

Q. In your opinion would any portion of that area be adapted to business purposes?

A. It might after development of the residence lots out there.

Q. Would that be a factor which you believe a willing buyer would likewise have in mind?

A. Yes he would.

Q. Well now, makai of the highway there is another area consisting of 192 acres, is there not?

A. Yes sir.

Q. Would you regard that as of November, 1940 as a mere area of cane land?

(Testimony of Wilfred E. Harrison.)

A. No sir, I believe that is in the same category as the other lot, Lot "D".

Q. Residence and small farms?

A. Residence and small farming areas.

Q. From your experience could you say whether these small farming areas that you have in mind might yield a higher rent than cane land?

A. Yes they would.

Q. Such areas run to how much per acre per annum?

Mr. Courtney: That is objected to, Your Honor, on the ground that there is nothing there forming any basis for [325] comparison, indefinite, remote, contingent.

The Court: Where located?

Judge Robertson: Maybe my question was too broad.

Q. When you speak of this demand for small farming areas, in your opinion and judgment that demand would extend to these lands we are talking about in this case, as of November, 1940?

A. Yes I do.

Q. And these small farming areas, in your judgment, would run up to how much on rental per acre per annum?

A. Between $30.00 and $40.00.

Q. This 192-acre area, I think you have stated that that comes in the same category as you have described with reference to Lot "D"?

(Testimony of Wilfred E. Harrison.)

A. Yes I did.

Q. A combination of residences and small farming lands? A. Areas.

Q. What part of that area would be particularly connected with residence lots, Mr. Harrison?

A. We considered a depth of 150 feet along the entire frontage. That would be approximately 14.979 acres saleable in lots.

Q. You referred to that as frontage, frontage on what? A. On Dillingham Boulevard.

Q. Already in existence? A. Yes.

Q. So that that line of lots would have their road frontage immediately available without any construction on the part of the owner?

A. They would.

Mr. Courtney: Objected to, Your Honor, incompetent, irrelevant, assuming a false hypothesis, assuming a subdivision which doesn't exist. [326]

The Court: Overruled.

Q. When you refer to small farming areas you have in mind what would be in the rear of that line of residence lots? A. Yes sir.

Q. Considering the highest and best and most profitable use that that 192-acre area was adapted as of November of last year, what, in your opinion, would a willing buyer have paid to a willing seller for that area?

Mr. Courtney: Same objection; on the further ground that the evidence is not competent, no foundation for it,—assumes a false premise.

(Testimony of Wilfred E. Harrison.)

The Court: Overruled.

Q. You may state your answer.

A. $182,058.00.

Q. Let's take up now the remaining area, 77 acres and a fraction involved in Case 434, did your examination and investigation include that area, Mr. Harrison? A. It did.

Q. How would you classify that area in comparison to these two other areas you have spoken of?

A. The same way,—residence and small farming lots.

Q. Do you believe that as of November last year that that 77-acre area could properly be classed as mere cane land? A. No it couldn't

Q. Where would the portion of that 77-acre area that you classify as residence property extend?

A. Extend along Dillingham Boulevard to a depth of 150 feet.

Q. That 150-foot strip would have the same class and [327] advantages as the 150-foot strip on the 192-acre area? A. It would, yes.

Q. It would be an extension of the same line?

A. Yes sir.

Q. What, in your opinion, would a willing buyer have paid a willing seller for that area last November, taking into consideration all the elements that you have mentioned as entered into the value of that area at that time? A. $63,772.35.

Judge Robertson: You may cross examine.

(Testimony of Wilfred E. Harrison.)

Cross Examination

Questions by Mr. Courtney:

Q. What rate of capitalization did you use, Mr. Harrison? A. On what land?

Q. On all of them.

A. We used two, the residence lots of 4% and the area for small farm lands at 5%.

Q. And using that factor on your estimated rentals you arrived at the values you have given, is that right? A. Yes sir.

Q. Did you assume, in arriving at your opinion with respect to the gore tract,—I will take that first,—did you assume a certain kind of subdivision? A. Yes, we assumed a subdivision.

Q. We?

A. I assumed a subdivision of lots along the frontage there along the railroad right-of-way.

Q. Along the railroad right-of-way?

A. Yes.

Q. Were you in court when Mr. Castro was testifying? [328] A. I was not.

Q. There is a line marked "C"-"D",—marked "A"-"B",—I believe it should have been marked "C"-"D",—anyway it is the line that parallels the Oahu Railway right-of-way at the lower end of the tract? A. Yes.

Q. Is that the place where you assumed a certain number of lots? A. Yes.

Q. How many? A. 77 lots.

(Testimony of Wilfred E. Harrison.)

Q. And you valued each lot, did you?

A. Yes.

Q. And multiplied the number of the lots with the value placed on them and thus arrived at your total value?

A. Some of the lots had varying areas.

Q. You made a little plat for yourself?

A. Yes, we figured the price of the lots in front and the various footages and multiplied that.

Q. How much of your value did you reflect for that frontage? A. $88,223.12.

Q. I am talking about this area on the gore lot mauka of the O. R. & L. right-of-way on the lower end of the tract? A. The 77 acres.

Q. I want to get your basis of valuation, whatever it was just give it to me anyway you want, I don't want to confuse you.

A. We placed a valuation of 12½ cents on the front areas. [329]

Q. 12½ cents?

A. 12½ cents a square foot.

Q. Along the lower or makai border of the gore parcel? A. Yes.

Q. That is Parcel "D"?

A. For the 77 lots.

Q. You cut up 77 lots? A. Yes sir.

Q. 150 feet deep? A. Yes sir.

Q. At 12½ cents a square foot and multiplied it and that gave you your total value? A. Yes.

Q. Which was what? A. $88,223.12.

(Testimony of Wilfred E. Harrison.)

Q. What about the rest of the property, how did you cut that up?

A. We cut that up into small farm land areas.

Q. How much? A. 41.892 acres.

Q. We are going to run over the border pretty soon. I was talking to you about Lot "D",—we are going to be a little short of acres.

A. 61.512 acres in Lot "D". We took out 16.202 acres for residence lots and roadway.

Q. You placed a 12½ cents per square foot value on each of the 77 lots and then you capitalized that at 4%, is that it? A. Yes sir.

Q. That is your valuation? A. Yes sir.

[330]

Q. How about the 41.82 acres, you cut that into how many lots?

A. We didn't cut that into lots; there was 41.892 acres.

Q. How did you get your valuation on that?

A. We figured that some of that area could be rented anywhere from $30.00 to $40.00 an acre.

Q. Which and where?

A. In that 41.892 acres.

Q. Where, what portion? A. In Lot "D"

Q. What part of Lot "D"?

A. All over that area.

Q. $30.00 to $40.00 an acre? A. Yes.

Q. So you cut it into how many plots?

A. We took ten acres at $35.00, ten acres at $40.00.

(Testimony of Wilfred E. Harrison.)

Q. Were these in one-acre tracts?

A. No; we took them as 10-acre tracts.

Q. 10-acre tracts?

A. Yes. We took the balance of 21.892 acres at $30.00.

Q. I don't follow you yet,—you cut it up into 10-acre tracts or ten 1-acre tracts?

A. Two 10-acre parcels we gave $35.00 and $40 respectively to, and the balance 21.892 acres we gave a figure of $30.00 per acre.

Q. But first you cut them up then you figured out the rental at 5%, is that it?

A. No, we cut them up and we put a rental on them, $30.00 per acre for the 21.892 acre tract, $35.00 and $40.00 on the balance.

Q. That was on the basis of 5%? [331]

A. No.

Q. What capitalization did you use?

A. That gave us a valuation of rental, annual rental of $1,406.76.

Q. What rate did you employ in order to get your fair market value?

A. Divide that by the number of acres which gave us an average per acre of $33.58.

Q. Capitalized at?

A. We capitalized that at 5%.

Q. That is the value you thought the fair market value to which you have just testified?

A. Yes sir.

Q. Let's pass to the other side of the road——

(Testimony of Wilfred E. Harrison.)

Juror: Mr. Courtney, will you make it plain how he arrived at the value of the residence lots; he has worked that out at 12½ cents and then the capitalization at the——

Mr. Courtney: Ask the witness.

Juror: You capitalized the 12½ cents?

Witness: We capitalized this rental on the small farm areas.

Juror: How about the residences?

Witness: We gave 12½ cents a foot for that.

Juror: You didn't capitalize that?

Witness: No.

Q. (By Mr. Courtney): Where did the first 4% rate come in?

A. We worked another scheme, a leasehold scheme on the same valuations.

Q. Which valuation are you testifying about? [332]

A. I am testifying about the fee.

Q. Fee value? A. Yes.

Q. Do you know whether these properties could be sold in fee?

A. I don't know whether the trust document would allow that.

Q. In 1940? A. I don't know.

Q. How about the property on the lower side of the road, let's take up 434, that is the 77-acre tract, Mr. Harrison? A. 77.278 acres.

Q. Let's finish with Civil 436, that has 100 some

(Testimony of Wilfred E. Harrison.)

odd acres outline in yellow, did you distinguish between those cases?

A. I took the whole area as one area, 192.956 acres.

Q. Did you reflect any different value in the lower frontage in that parcel?

A. No, we didn't.

Q. How did you arrive at $182,058.00 for that parcel, did you do it the same way as in the other instance?

A. We put 20-cents on the frontage on that land.

Q. 20-cents up here? A. Yes sir.

Q. I thought you told me you didn't apportion the value on the frontage? A. On Lot C-3-A.

Q. I am talking about Lot C-3-A, do you want to come to the board, Mr. Harrison?

A. I know what you mean,—I took a depth of 150 feet [333] off the entire frontage for residence lots.

Q. All the way down here (indicating a point on Government's Exhibit "A").

A. Yes all the way down.

Q. You took a depth of 150 feet?

A. Yes.

Q. And how many lots did you cut up?

A. That was cut up into 72 lots, 71 saleable and one we reserved as an entry lot.

Q. How much did you value each lot?

A. At 20-cents a square foot.

(Testimony of Wilfred E. Harrison.)

Q. From that did you arrive at your total value? A. Then we took——

Q. Did you take your total value by the multiplication method for the residence lots?

A. Yes.

Q. Did you use any rate of capitalization?

A. No.

Q. You didn't? A. No.

Q. Where did this 4% come in that you testified to on direct examination, on direct examination you testified that in arriving at the value you capitalized the residence lots at 4% and capitalized the other lots at 5%, where did that come in, that 4% capitalization?

A. I worked this appraisal out on the basis of fee sale plan and also on the basis if a person leased all the lands.

Q. Now, what value are you testifying to in this court, are you testifying to the capitalized value or are you testifynig to the value of an assumed subdivision? [334]

A. I am testifying to the fair market value.

Q. Of an assumed subdivision, isn't that right?

A. What a willing buyer could do with that land.

Q. You assumed that it would have to be cut up 150 feet deep and the length of the plot, didn't you? A. Yes.

Q. And that would give you a certain number of lots, isn't that right? A. Yes.

(Testimony of Wilfred E. Harrison.)

Q. Then you multiplied that and got your value, isn't that right? A. Yes.

Q. How about the back property?

A. We reapportioned there,—it consisted of approximately 175 acres.

Q. How did you arrive on your value at that?

A. We figured that that land was useable there the same as in Lot "D", the fair rental would be $33.58, and, therefore, the average per acre would be $671.60.

Q. What rate of capitalization did you base on that assumed rental? A. 5%.

Q. And that is the value to which you are testifying here? A. Yes.

Q. There is no doubt about that in your opinion?

A. No.

Q. You didn't misunderstand my questions?

A. I don't think I did.

Q. Let's take Case 434, you placed a fair market value on that of $63,772.35? [335]

A. Yes sir.

Q. Did you reflect any different value in the frontage on that 77-acre tract?

A. Yes I took——

Q. Tell me what method you used on that?

A. The same as the other two lots.

Q. Just exactly the same? A. The same.

Q. You cut up the frontage into lots?

A. Yes.

(Testimony of Wilfred E. Harrison.)

Q. 150 feet deep? A. Yes.

Q. How many lots? A. 22 lots.

Q. Each lot worth how much?

A. $1800.00 per lot.

Q. And you multiplied that by the number of lots? A. Yes.

Q. Did you use any rate of capitalization on that? A. No sir.

Q. You did use a rate of capitalization on the rear portion? A. Yes I did.

Q. That is the fair market value to which you are testifying here today? A. It is.

Q. Computed in that way? A. Yes sir.

Q. Now, Mr. Harrison, for how many years do you think a purchaser would have to be interested in this property before he had it developed,—how many years would it take [336] to develop these 300-acres?

A. Before he sold them off?

Q. Yes?

A. I would say five or six years.

Q. Part of the property was not available until 1943, the lower part of this property, the lease doesn't expire until December 31, 1942, does it?

A. December 31, 1943.

Q. 1943? A. I believe so.

Q. I don't suppose one year would make very much difference when you have to figure on a 10-year program, isn't that right?

(Testimony of Wilfred E. Harrison.)

A. (No answer by the witness.)

Q. He would have to hold it for three years and then take a chance on selling it for seven years in the future, is that right?

A. I understand that Lot "D"——

Q. I am talking about the property on the lower side of the road, this property here (indicating on Government's Exhibit "A"), all this,—it would take about seven years to dispose of that?

A. Yes.

Q. That he was able to sell it?

A. Less than that.

Q. Seven years?

A. I said about six years.

Q. How about this property at the top (indicating an area on Government's Exhibit "A"), how many years would it take to dispose of that? [337]

A. That I believe could be disposed of within a year and a half.

Q. Now, Mr. Harrison, you are an employee of the Bishop—— A. Trust Company.

Mr. Courtney: I think that is all with the witness. I move to strike the testimony, all of it, of this witness on the ground that it is wholly incompetent, nothing to establish the fair market value, based on a false premise, has no relevancy or materiality in this case.

The Court: Overruled.

Mr. Courtney: That is all.

(Testimony of Wilfred E. Harrison.)

Redirect Examination

Questions by Judge Robertson:

Q. When you speak of your ideas as to the differentiation that might be made in each of these areas with respect to residence lots and small farm areas, is that what you have in mind a willing buyer might have in mind in making this offer?

A. I do.

Q. You realize the willing buyer might have plans of his own differing somewhat from what you had in mind? A. Yes sir.

Q. In placing your market value on these various areas, do you make allowance for the fact that the willing buyer might possibly have a better method than you have in mind?

Mr. Courtney: Objected to as incompetent, irrelevant and immaterial, leading and suggestive, an attempt to impeach his own witness; the witness has testified as to his values.

Judge Robertson: Counsel is doing some wishful thinking.

The Court: The question is leading, sustained.

[338]

Q. In giving your opinion as to what a willing buyer would have paid to a willing seller for this property last November do you make any allowance for the possibility that the willing buyer might have some plan of subdivision differing from the plan you had in mind?

(Testimony of Wilfred E. Harrison.)

Mr. Courtney: Same objection.

The Court: Overruled.

A. Yes, we in all cases in determining our value, my value, I took 20% as a possible profit for the buyer.

Q. By that you mean that a willing buyer could have paid these values that you have testified to and made a profit of 20% over and above that, is that it?

A. He would have a reduction of 20% over the value which I first arrived at.

Q. Reduction of what?

A. If the willing buyer purchased the property at the figure of $63,449.43 and developed it along the lines I have placed here he would net approximately 16%.

Q. Over and above his investment?

A. Over and above his investment.

Q. That assumes that he subdivided and sold?

A. Yes sir.

Q. On the other hand, if the willing buyer had in mind a subdivision for leasehold, then what?

A. That would come to about the same figure.

Q. Come to about the same figure using your 5% rate of capitalization? A. Yes sir.

Q. On your cross-examination with reference to the gore lot, unless my hearing is defective, you used a figure of $88,223.00,—did I hear you correctly or not? [339]

A. That was on the gore lot.

(Testimony of Wilfred E. Harrison.)

Q. So I understood.

A. That was the value saleable in lots at 12½ cents a square foot, total $88,223.12.

Q. By that I understand you to mean if the willing buyer last November had acquired Lot "D" for $63,449.00 he could have disposed of it in a year and a half for $88,223.00? A. No sir.

Q. What is it then?

A. You mean the whole of Lot "D"?

Q. Lot "D" comprising an area of 61½ acres, unless I heard you wrong you applied a figure of $88,223.00 to that area, is that right?

A. No sir, that was to the land saleable in lots, the 77 acres, I did not include the small farm lands.

Q. 77 acres in which area?

A. In Lot "D".

Q. Do you mean to say that the willing buyer after paying for that $63,000 could have sold the 77 lots for $88,223.00? A. Yes sir.

Q. He would be making considerably more than 16% profit on his investment, wouldn't he?

A. He would have expenses to put that subdivision on.

Q. You contemplate that in order to make that profit on those 77 lots he would spend some money for a roadway?

A. Roadway and development.

Judge Robertson: That is all.

(Testimony of Wilfred E. Harrison.)

Recross Examination

Questions by Mr. Courtney:

Q. Mr. Harrison, do you want this court and jury to understand that a willing buyer, such as you conjured, would spend $182,000 on the lower end of this property, risk it now, as of November 1940, with possible sales extending over a period of seven years and only expect to realize 16%.

Judge Robertson: We object to the question, it is misleading and involves a misconstruction of the witness' testimony.

Q. Do you want this court and jury to understand——

Judge Robertson: I am waiting for a ruling, Mr. Courtney?

The Court: I have taken it that counsel has withdrawn the question and asking another.

Mr. Courtney: I am asking another question.

Judge Robertson: Counsel doesn't keep us posted —am I to understand that the objectionable question is withdrawn?

Mr. Courtney: The question is withdrawn.

Judge Robertson: You may use your own adjective, Mr. Courtney.

Q. Do you want this court and jury to understand that after paying the prices, which you say are the fair market values of these properties, which you have testified to here, that you have

(Testimony of Wilfred E. Harrison.)

limited the profit which could ultimately be derived from their sale to from 16½% to 20%?

A. I am talking about Lot "D".

Q. I am going to take Lot "D"?

A. Yes I do.

Q. You limit that to 16% to 20%?

A. Yes. [341]

Q. What about the others?

A. Lot C-3-A and C-3-B, that is the 192-acre parcel, on the figure of $182,058, I figured that the buyer could make a profit of 22½%.

Q. And that is in seven years? A. Yes sir.

Q. $182,000 worth of property held seven years, —what about the other lot, 434?

A. 22% profit.

Q. Don't you know what the experience of real estate subdividers is, and the price they can afford to pay for property for subdivision purposes, what percentage of the final value or prospective sales, in the universal experience of the profession?

A. That varies,—it would run anywhere from 15% to 50%.

Q. What about the experience right here in the City, what about the experience of St. Louis Heights, what about the experience of the Magoon subdivision,—what percentage ought to be employed in those cases,—what about Mokapu subdivision?

Judge Robertson: That is objected to, Your Honor, as incompetent, irrelevant and immaterial,

(Testimony of Wilfred E. Harrison.)

having no bearing on any of the issues involved in this case, what the profits or losses may have been upon some other subdivision.

Q. Do you know——

Judge Robertson: Let's have a ruling.

Mr. Courtney: Withdraw the question.

The Court: There are so many questions involved——

Mr. Courtney: I have withdrawn the question.

Q. Do you know anything about the experience at Mokapu, St. Louis Heights and on the Magoon subdivision? [342]

Judge Robertson: Objected to on the grounds already stated that the profits and losses on some other subdivision made at some indefinite time can have no possible bearing on the value of the land at Moanalua that they have condemned and taken in these proceedings.

The Court: Sustained.

Q. How many acres of land, do you know of, Mr. Harrison, on the mauka side of the property condemned, owned by the Damon Estate in Moanalua, occupied by cane fields and otherwise, are available for development?

A. I don't know the exact area.

Q. Do you know what would happen to the market if those lands were opened up for development, all of them?

A. I knew they would not be.

(Testimony of Wilfred E. Harrison.)

Q. You assumed they would not be?

A. No, I found that out from the trustees.

Q. Oh, you took it up with the trustees and they told you it would not be opened up?

A. They did.

Q. You were safe in saying this property would have no competition?

A. No, but because they are conservative, used to put on a certain area at one time and then later on possibly put on another.

Q. Based on what the prospects would be?

A. (No answer by the witness.)

Q. What would happen to your subdivision if the 2½ mile frontage were opened up for development?

A. No one would put on such a subdivision at that time.

Q. It is available for subdivision, isn't it?

A. I don't know what idea the trustees have.

[343]

Q. I am not asking you what ideas the trustees have, I am asking you to tell us from what you have seen, what you know, if that 2½ or 3-mile frontage on the mauka side occupied by the Honolulu Plantation Company isn't available for subdivision? A. I don't know.

Q. You wouldn't see that as you went by?

A. Yes.

Q. You had some conversation with the trustees

(Testimony of Wilfred E. Harrison.)

with reference to whether or not this other area on the mauka side of the road was available?

A. I had.

Q. Having it from their answer that they would not subdivide that other area you proceeded to place your value on these three properties, is that it?

A. Yes sir.

Mr. Courtney: That is all.

Re-redirect Examination

Questions by Judge Robertson:

Q. Speaking of the time in which the willing buyer of that 192-acre tract would have to wait, the lease on that tract continues until December 31, 1943, does it not? A. I believe so.

Q. So that during the period from November, 1940, to the end of 1943 the willing buyer would get the rental specified in the plantation lease, would he not? A. He would.

Q. In your judgment would the willing buyer who had acquired this title, subject to that lease, getting the rent in the meantime, have ample time to formulate his [344] plan for the development of that area and the obtaining of buyers before it was put on the market?

Mr. Courtney: That is objected to, Your Honor, on the ground that it is incompetent, irrelevant, speculative and contentious in the extreme.

Judge Robertson: We are dealing here with what

(Testimony of Wilfred E. Harrison.)

a willing buyer would have in his mind, that is what these experts are called upon to do, to give their opinion what a willing buyer would have in mind in determining his course.

The Court: Overruled.

Q. Answer the question Mr. Harrison?

A. He would.

Judge Robertson: That is all.

Mr. Courtney: We again renew our motion to strike all the testimony of the witness for the reasons previously given, on the ground that it is incompetent, assumes a false set of facts and conditions which does not reflect the true market value tested by the ordinary rule.

Judge Robertson: We submit it does, Your Honor.

Mr. Courtney: Let the Court rule.

The Court: Overruled.

Mr. Courtney: That is all.

Judge Robertson: That is all.

The Court: The Court is recessed until 9:00 o'clock tomorrow morning.

(Adjourned—11:55 o'clock a. m.) [345]

On Friday, the 25th day of July, 1941, at the hour of 9:10 o'clock a. m., all parties being present in the courtroom, the following further proceedings were had:

The Clerk: Civil Numbers 434 and 436, cases called for further trial.

The Court: The jury are all present and in the box.

Judge Robertson: Mr. Henderson, will you take the stand please.

WELLINGTON S. HENDERSON

being first duly sworn as a witness for the defense testified as follows:

Direct Examination

Questions by Judge Robertson:

Q. Will you state your name, please.

A. Wellington S. Henderson.

Q. Where do you reside?

A. San Francisco, California.

Q. Are you in business there? A. Yes sir.

Q. What is the nature of that business?

A. In an investment management business. I advise clients on the investment of their monies.

Q. How long have you been engaged in that business?

A. I have had my own firm since July 1st, 1932. Before that, since 1925, I was working for the American Trust Company, a San Francisco bank.

Q. Have you been in Honolulu heretofore?

A. Yes, I represented the American Trust Company in Honolulu for three years, 1926-'27, '28. I left here then and since I have done business here

(Testimony of Wellington S. Henderson.)

regularly and come down [346] at least once a year, since 1930 I am sure.

Q. Have you a clientele in Honolulu?

A. Yes.

Q. As adviser for the investment of funds what is it necessary for you to be posted on?

A. I must know the kind of investments which are legal for trust funds in Hawaii, and I must follow the laws, and I must know all the issues that qualify for such investments.

Q. Issues of what?

A. Bonds, stocks, mortgages. That primarily is the nature of my business, the bond business, because that is what is bought by trust funds mainly.

Q. Does that knowledge on your part involve a knowledge of what various investments yield in interest? A. Yes sir, has to.

Q. You have stated that you are required to have this knowledge and information with reference to Hawaii, how about the mainland?

A. I have clients on the mainland, I have clients who reside in California, New York, Chicago, and other States, and, of course, in each State I must know the trust laws and what investments are legal for trust funds.

Q. Are you also required to have a knowledge of the interest yield of available securities on the mainland as distinguished from Hawaiian securities? A. Yes.

Q. Are the investments of your Hawaiian clients

(Testimony of Wellington S. Henderson.)

confined to investments in Hawaii, or do they extend to mainland securities? [347]

A. They extend to a great extent in mainland securities. That has been more true during the last ten years; many of the trustees in Hawaii have wanted to diversify their investments and have sought mainland securities for that purpose.

Q. So that all of their eggs are not in one basket?

A. I think that is the main reason; they have gone through several periods of sugar depression here and they wanted to have their investments properly diversified.

Q. Do you mind telling us who some of your local clientele are, who do you advise in Honolulu about investment of funds?

A. I am retained by the Bishop National Bank, American Factors, Alexander & Baldwin, the Bishop Estate, which includes the three trusts there, Charles R. Bishop, Bernice Pauahi Bishop and the Bishop Museum, and I advise both the Bishop Trust and the Hawaiian Trust Companies on their bond investments. I advise individuals here too, but I would rather not mention their names, not for my own reason, but maybe they wouldn't like to have that made public.

Q. As of November 1940, what was the earning power of money invested in safe securities?

Mr. Courtney: I think that is objected to as im-

(Testimony of Wellington S. Henderson.)

material, we are here dealing with the fair market value of land, and the earning power of money in November 1940 hasn't any particular relation to the earning power of land.

The Court: In view of the evidence already in, I believe the question to be proper.

Mr. Courtney: The objection is to the competency [348] of the evidence and its materiality.

The Court: The objection is overruled.

Q. Read the question.

(Thereupon the Reporter read the question to the witness.)

A. If the funds were sufficiently large so that a properly diversified list of trust investments were purchased I think the return should be between 3% and 4%.

Mr. Courtney: I renew the objection and move to strike the testimony because the witness' testimony relates to trust investments which are wholly different.

Judge Robertson: That is not the evidence at all; this witness has not limited his knowledge and information and opinion to trust investments at all, covers other investments as well. That is his evidence.

The Court: Overruled.

Q. You made reference apparently to the size of an investment, what have you in mind in that connection?

(Testimony of Wellington S. Henderson.)

A. If a small amount of money were available for investment the trustee might purchase just one security and might obtain a yield of 3½% or 3¾% on something that was eligible for trust investments, but if a broader list were purchased I don't believe as high a yield as that would be obtainable. For instance, bonds that are legal for trust investments in Hawaii yield slightly more than mainland bonds for the reason that the market isn't as large here, say Hawaiian Electric bonds here would yield 3.70.

Q. Hawaiian Electric is a 4% bond?

A. 4%, due in 1970, and they sell for a premium between 105 and 107, a similar bond on the mainland would yield [349] less than 3% as of now or of November, 1940; I think they would yield about 2.90 at that time, a similar bond.

Mr. Courtney: I renew the objection and move to strike the testimony of the witness, it is not competent or material to any issue before this Court.

Judge Robertson: We oppose the objection, Your Honor, and motion to strike.

The Court: It appears to me to be rather close on account of the answer being limited to trustees' investments. Motion denied.

Q. You have referred to investment of trust funds, when you say that the earning power of money in safe securities, in sufficient amounts,

(Testimony of Wellington S. Henderson.)

would be between 3% and 4%, do you mean to limit that to investments of trust funds, or not?

A. A slightly higher yield would be obtainable; I don't think it would be obtainable if proper judgment for a reasonable risk were used. In other words, if the safety of the principal were the primary object to be secured by the investment of these funds and not high income I do not believe that during this period since November 1940 that more than 4% could be obtained.

Q. I want it to be understood, of course, Mr. Henderson, that we are excluding the element of speculation, anything in the way of gambling, we are dealing with investments that have regard to the safety of the capital as well as the yield of income of course.

A. That is the point I tried to make before, because you can obtain a much higher yield, but I don't believe it can be done with the safety of the principal as a primary object in view.

Q. You have stated that the yield from that kind of an investment in Hawaii is somewhat more than on the mainland [350] when you make the statement between 3% and 4%, does that apply to Hawaii or the mainland, or both?

A. Both; the mainland would be closer to 3%, but the reason I said between 3% and 4%, if a broader list of securities were purchased that would include some Hawaiian securities as well as mainland, I think the average would be between those two.

(Testimony of Wellington S. Henderson.)

Q. You have made reference to smaller amounts and large amounts for investment, can you define those terms somewhat, what have you in mind when you use the phrase "smaller amounts" and what have you in mind when using the phrase "larger amounts" for investment?

A. I would say that any amount in excess of $50,000 could be invested with proper regard for geographic and industry diversification, that is you would have the proper proportions of utilities and first mortgage bonds of other characters in different parts of the country, of the mainland as well as Hawaii. $50,000 is a rather arbitrary amount to choose, but if it is less than that the bonds cannot be purchased to the best advantage, or other securities. Is that what you mean?

Q. Yes. Do wise investors endeavor to diversify their investments?

A. Almost in every case that I know of they do; they don't all have the same formula, but in every well managed account you will see a great deal of thought given to geographical and industrial diversification.

Judge Robertson: You may cross-examine. [351]

Cross Examination

Questions by Mr. Courtney:

Q. Mr. Henderson, you say that during the last number of years the investors in Hawaii have been seeking outlets on the mainland, is that right?

(Testimony of Wellington S. Henderson.)

A. Yes.

Q. For how long a period has that been going on?

A. Since I have done business in Hawaii.

Q. How long a period is that?

A. Since 1926.

Q. And you attribute that to slumps in the sugar business?

A. No, not exactly; it is a general rule that investments should not all be in one place.

Q. I think you mentioned in your direct examination that there have been several slumps in the sugar business in Hawaii? A. Yes.

Q. That is the fact, isn't it? A. Yes.

Q. Unfortunately for all concerned, but it is the fact? A. Sure.

Q. Now in your testimony with relation to the earning power of money, you were confining yourself to the type of business you are in, in the stock and bond business, isn't that right?

A. I was having in mind what investment trustees can make.

Q. That is right? A. Yes.

Q. They would be restricted, be limited, to such investments as mortgage bonds on certain types of enterprises? [352]

A. I don't know just what the trustees in this case are limited to.

Q. Forget about this case,—I want to know the type of investments you had in mind?

(Testimony of Wellington S. Henderson.)

A. Every client has——

Q. Just what did you have in mind when you spoke of limited or restricted investments, what class or kind of securities did you have in mind?

A. They are different with each client.

Q. You testified on your direct examination on the earning power of money, which you say is between 3% and 4%, what particular kind of investment did you have in mind when you stated that the earning power would be 3 to 4%, what securities?

A. Investments with the primary object the safety of principal, and secondly the rate of return, which I think is the main principle to have in mind in the investment of money.

Q. Did you include in that field the earning power of real estate? A. No, I did not.

Q. Because that is an investment trustees do not make, is that it?

A. I am not qualified to advise on that, on real estate.

Q. You are not qualified to speak on that?

A. No.

Q. Do you know what the rate of interest charged in Hawaii was in November 1940 on mortgage loans on unimproved property? A. No sir.

Q. You don't?

A. I wouldn't recommend that type of an investment. [353]

(Testimony of Wellington S. Henderson.)

Q. You wouldn't recommend that?

A. I wouldn't.

Q. You consider that speculative?

A. Yes sir.

Q. Therefore demanding a higher yield in return? A. I should think so.

Mr. Courtney: That is all.

Judge Robertson: That is all. Thank you, Mr. Henderson. Call Mr. Kearns.

RALPH A. KEARNS

being first duly sworn as a witness for the defense testified as follows:

Direct Examination

Questions by Judge Robertson:

Q. Please state your name.

A. Ralph A. Kearns.

Q. Do you live in Honolulu? A. I do.

Q. How long have you lived in Honolulu?

A. 41 years.

Q. What is your business, Mr. Kearns?

A. My business is real estate broker, and I try to be an appraiser.

Q. Are you a licensed realtor of this Territory?

A. Yes sir.

Q. How long have you been in the business of real estate broker and appraiser?

A. Altogether I would say about 25 years.

(Testimony of Ralph A. Kearns.)

Q. Are you familiar with the real estate on this Island and its various values?

A. I would think so. [354]

Q. At the request of the trustees of the Damon Estate did you examine certain land at Moanalua that had been taken by the Government in this case?

A. Yes I did.

Q. How much area did you examine on that job?

A. Oh I think 331 acres plus.

Q. Situated at Moanalua?

A. Yes, in the land of Moanalua.

Q. What did you find that these areas had previously been used for?

A. For the planting and cultivation of sugar cane.

Q. As of November, 1940 what, in your opinion, was the highest, best and most profitable use that those 331 acres were adapted to?

A. Well speaking in general terms about the whole area I would say that it was at that time a suburban residential area.

Q. Will you state your reasons for that opinion, Mr. Kearns?

A. Well formerly, for one thing, there was no great road or highway passing through that land as there was in November 1940, and another reason is that the rapid expansion of the City of Honolulu in the last, we will say ten years, has caused a very changed condition in the method of living among many people. In addition to that there was a very

(Testimony of Ralph A. Kearns.)

large civilian population employed in both Pearl Harbor and Hickam Field.

Q. In your opinion could those 331 acres in November, 1940 be properly classed as mere cane land?

A. No, in my opinion in November, 1940 the day had long [355] gone by when that land could properly be thought of or referred to as cane land.

Q. In making your investigation of those lands, did you ascertain that there was an unexpired lease on those areas held by the Honolulu Plantation Company? A. Yes I was informed of that.

Q. Let's take up these various areas, one of the areas involved is marked on the map Lot "D", also known as the gore lot, is there not?

A. Correct.

Q. Referring to that area containing 61½ acres, in your opinion in November, 1940 what was the market value of that area, meaning by market value the price that a willing buyer would have paid to a willing seller for that area in November, 1940?

A. In my opinion the value of that land, upon the somewhat foolish theory of a willing buyer and a willing seller, is $63,449.43, or rather was $63,449.43.

Q. Do you mind stating your reasons for that opinion, Mr. Kearns?

A. The opinion of the value?

Q. Yes, your opinion that that lot "D" was worth $63,449.43.

(Testimony of Ralph A. Kearns.)

A. Well that answer entails a considerable amount of figures which I will read to you.

Q. Perhaps you can abbreviate it by omitting detailed figures and stating in a more general way the kind of land, character of land you found in Lot "D", and the basis of your opinion?

A. Well upon the understanding that I was not permitted to go very deeply into the matter of a possible subdivision [356] of this or any other parcel of land under condemnation——

Q. Perhaps we can put it this way, Mr. Kearns, you have stated that in your opinion a willing buyer would have paid that amount for that land. In that connection what factors would that willing buyer have in mind in paying that amount for that lot, what would a willing buyer have taken into consideration?

A. A willing buyer, assuming, of course that he was a man experienced with the selling and supervision of land, would have taken into consideration the question of what amount of expense he would be put to sell it at the best advantage to himself.

Q. By that you mean, I take it, that the willing buyer would have seen a profit if he bought that land and subdivided it and put it on the market, is that it? A. Yes.

Q. For what purpose do you say the willing buyer would have subdivided or had in mind the subdivision of that land, subdivided for what?

(Testimony of Ralph A. Kearns.)

A. Well, in my opinion, and, of course I cannot control the thoughts of other men who are familiar with land, but in my opinion the reasonable method for handling that piece of land would have been to take a strip off it at its makai side 340 feet deep. In the middle of that strip, in its entire length, put a 40-foot road and in that way have a double tier of lots, one tier on the makai side of the road and one tier on the mauka side of that road, and for the time being he might very well have considered the balance of the land as very useful and probably much in demand as acreage, small acreage lots for the purpose of truck farming. [357]

Q. That 340-foot strip that you say the willing buyer might very well have had in mind that would be for residence lots in your judgment, would it?

A. Yes.

Q. And you say that in November, 1940 there was a demand for such lots?

A. It would be my opinion if such situation existed that Lot "D" at that time, in November, 1940, those lots would have been readily taken.

Q. Taken either as leaseholds or purchases?

A. Either as leaseholds or outright purchases.

Q. You realize, I take it, that the willing buyer could possibly have had in mind some other method of subdivision, could he not?

A. Oh quite so, because that method that I worked that might possibly have been not as advantageous to a possible willing buyer as such a

(Testimony of Ralph A. Kearns.)

buyer could make for himself he having a better knowledge of the subdivision of large pieces of land than I do.

Q. You have referred to the existing demand for house lots, what can you say as to the demand for small agricultural areas for truck gardening purposes, was there a demand for that class of property?

A. Yes. My answer to that is if that land were presented for that purpose the area that I have set apart for that, some 41,892 acres, being divided into small acreage lots would have been very readily either sold or leased according to the policy of the owner.

Q. You base that statement, as I understand you, on your knowledge that demands for such lots and such acreage existed at that time? [358]

A. Yes.

Q. On the makai side of the road there is an area of 192 plus acres, is there not?

A. Yes.

Q. In your opinion what was the value, the market value of that area in November, 1940?

A. $182,058.00.

Q. Will you state your reasons for that opinion?

A. Well, the reasons for that opinion concerning Lot C-3-A, etc., is the same as my opinion expressed concerning Lot "D".

(Testimony of Ralph A. Kearns.)

Q. Is that area the same general class as Lot "D"?

A. Well I would say, from the standpoint of the possible purchaser of the residential area, that it would be preferable to the residential area which I set up in Lot "D".

Q. The willing buyer, in your judgment, would regard what portion of that 192-acre piece as residential?

A. In my opinion, and by the method which I used to arrive at the figures that I am mentioning to you, the entire frontage of it of 150-feet deep.

Q. When you say "frontage" you refer to the frontage along the highway, do you? A. Yes.

Q. That line of lots apparently could have been laid out without any particular expense the road frontage being already there, is that right?

A. That is correct.

Q. As to that 192-acre area, back of what you regard as the residential zone, what, in your judgment, would be the best, highest and most profitable use for the remainder of [359] that area?

A. At that time?

Q. Yes?

A. Oh, same use if it had been available.

Q. When you say the same use, what do you have in mind? A. Truck farms.

Q. Same use as a portion of Lot "D"?

A. Yes.

Q. State whether or not the rental derivable

(Testimony of Ralph A. Kearns.)

from truck farming areas,—state how the rentals derivable from truck farming areas compares with rentals derivable from cane land, is it higher or lower?

A. In general terms it is higher.

Q. What, in your judgment, would be a reasonable rental value of the truck farming area that you are referring to in your testimony here?

Mr. Courtney: Objected to, Your Honor, as incompetent, irrelevant and immaterial, no proper foundation laid; no relation to any issues in this case.

The Court: Overruled.

Q. You may answer the question. Read the question.

(Whereupon the reporter read the question as above set forth).

A. Ranging from $30.00 net per annum per acre to $40.00 net per annum per acre.

Q. There is another area there, Mr. Kearns, Lot C-1 and C-2 on the map? A. Yes.

Q. Containing an area of 77 and a fraction acres? A. 77.288 acres.

Q. Did you examine that area also?

A. Yes I did. [360]

Q. How does that area compare with the adjoining 192-acre area in character, quality and situation?

A. Well, in character and quality I would think it is about the same; in situation or location it

(Testimony of Ralph A. Kearns.)

possibly might be a little better than the 192-acre portion.

Q. Why?

A. Because it joins the boundary of what is known as Hickam Field.

Q. In your opinion what would a willing buyer have paid a willing seller for that area in November, 1940? A. $63,772.35.

Q. What is the basis of that opinion, Mr. Kearns?

A. That opinion is based on the other opinions that I have given, expressed here, that the frontage could be, 150 feet of it, rather the entire frontage of it 150 feet deep could be readily set apart for residential lots, and the balance of it could be very readily offered and taken either by the sale of them or by lease for the purpose of truck farming.

Q. In expressing these three opinions, Mr. Kearns, have you taken into consideration all the elements and factors that you believe would have been in the mind of a willing buyer at that time?

A. Yes, I think that is a correct statement to make, that a willing buyer would have taken into consideration the question of the extent of the demand for such areas of truck farming, and the extent of the demand or likelihood of a demand for residential areas in that locality and, of course, would have taken then into consideration the question of what expenses would be necessary to him,

(Testimony of Ralph A. Kearns.)

and in that way arrive at a figure that he could afford to give for it. [361]

Q. And make a profit?

A. And make a profit.

Judge Robertson: You may cross-examine.

Cross Examination

Questions by Mr. Courtney:

Q. How much profit, Mr. Kearns?

A. According to the figures, Mr. Courtney——

Q. Just answer in terms of percentage, how much profit?

A. According to the figures used by me in this attempt to ascertain the value of these parcels of land it would vary.

Q. Please answer the question,—how much profit in terms of percentage, that is all I am asking you to answer, Mr. Kearns?

A. I can only speak of my figures because if you are familiar with the handling of land, and particularly with the matter of the subdividing of land, you well know that sometimes there is a venture connected with it and sometimes misadventure.

Q. How much profit have you allowed for this venture?

A. I have allowed a profit ranging from 16% to 22% plus.

Q. 16% to 22%, is that it? A. Yes.

Q. What is the 16% on?

A. For instance——

(Testimony of Ralph A. Kearns.)

Q. Just tell me what particular plot of land this 16% applies to?

A. I am trying to do that if you will just give me a little leeway.

Q. I will give you all the leeway in the world.

A. If Lot "D" and Lot C-3-A, etc., are combined and the [362] buyer should pay $245,507.43 for them plus the expenses considered necessary of $57,503.50, and sells for only $364,387.78 he realizes an approximate profit of 16%, set out by these figures I have mentioned, being the ones used in the total figures, the addition.

Q. Now give us your calculation on Parcel "D"?

A. Parcel "D",—if a buyer paid $63,449.43 for Lot "D" plus expenses as set forth and sold for only $116,357.78 he realizes a profit of approximately 16%.

Q. For how long a period would it take a purchaser to dispose of, or an owner to dispose of all of the land that you have cut up in this parcel makai of the road? A. Well——

Q. What period of time do you conjure in your mind as being the time necessary to dispose of all of these lots at the figure you have indicated and at the profit you have indicated?

A. Unless some disaster comes to this Island as a whole I would think he would be able to dispose of the whole of this land in the method indicated by me between two and three years' time after the expiration of the lease existing upon the land.

(Testimony of Ralph A. Kearns.)

Q. That is commencing with the year 1944?

A. That is correct, for those two parcels, C-1 and C-2 C-3-A.

Q. And the same reasoning would apply to the adjoining property?

A. He would get possession of Lot "D", as I understand it, in April of this year, and I would think that he would be well clear of all of his work there possibly within eighteen months. [363]

Q. What rate of interest do the banks in the Territory charge on loans on unimproved property, Mr. Kearns?

A. I cannot testify about that.

Q. You dont know anything about that?

A. No.

Q. So you wouldn't know what a man would have to figure on who had a loan on it in the way of the cost of *of* having the money to hold it?

A. Well I know in a general way that in this community it depends considerably on the man in addition to the securities he has to offer.

Q. You have no monopoly on that in your community,—tell me what the rate of interest is that is charged by the banks on loans on unimproved property in Hawaii?

Judge Robertson: Objected to as already answered, if the Court please.

Q. Do you know or don't you know?

A. Do I know or don't I know what?

Q. What the rate of interest charged by the

(Testimony of Ralph A. Kearns.)

banks is on loans on unimproved property of this class?

A. I am not familiar with what the banks do; I am somewhat familiar with what the trust companies did.

Q. With what the trust companies did?

A. Yes.

Q. When?

A. Oh for the last twenty-five years.

Q. You mean the Union Trust?

A. No I don't.

Q. What Trust Company?

A. For instance the somewhat well known Trust Company [364] with the title of Bishop Trust Company.

Q. What rate did they charge on loans of unimproved property?

Judge Robertson: Objected to as incompetent, irrelevant and immaterial, having no bearing on any of the issues in this case; remote in point of time, we are dealing here with November, 1940, Your Honor.

The Court: Sustained.

Q. So you don't know anything about the loan rate of interest on unimproved property in 1940, is that it? A. I don't.

Q. Do you or don't you?

A. I said a moment ago I knew what was the habit of the Bishop Trust Company in that respect.

Q. What rate of interest did you have in mind

(Testimony of Ralph A. Kearns.)

when you calculated the costs of holding this property?

Judge Robertson: Objected to, Your Honor, no time is specified.

Q. In November, 1940?

A. I would say, and I believe it can be substantiated, that depending upon the quality of the buyer to some extent that he certainly could get his money for 5% and possibly less.

Q. Were you in court when Mr. Henderson testified? A. Mr. Who?

Q. Mr. Henderson?

A. I know nothing about the man.

Q. So you think you could go down to the Bishop Bank or the Bishop Trust Company and get a loan on this property, having paid $245,000 and some odd for it, at the rate of 5%, [365] do you, in November, 1940? A. Depending on the buyer.

Q. Just answer,—do you want the court and jury to understand that——

Judge Robertson: I object to this continual interruption of the answers of the witness, that is no orderly procedure at all; the witness is entitled to some proper treatment and leeway in giving his answers to the questions as put to him. I object to the question, it is limited to the Bishop Trust Company.

Q. Any trust company, I will make it any trust company.

(Testimony of Ralph A. Kearns.)

Judge Robertson: If the witness knows what the practice of other trust companies is.

Witness: When I referred to a willing buyer in my mind that doesn't simply mean Mr. Rabe over there, it means a coterie or hui coming together and buying it as such.

Q. I am still waiting for an answer whether you know, as a real estate man, what rate of interest would be charged for a loan by any of the institutions in Hawaii, I don't care whether private or trust companies, or what trust company, on a real estate investment of this kind having paid the purchase price for it which you say is the fair market value of this property in November, 1940,—do you know the answer to that question or don't you?

A. I can answer the question indirectly by making the statement that these members of the hui might not be required to borrow any money.

Q. Will you please, as you have assumed so much this morning, Mr. Kearns, will you assume that they did have to borrow as so many people do? [366]

A. Very well. I still say that the rate of interest that would be finally settled upon this very suppositious loan might be lower than 5%,—it might be as low as 3-1/2%.

Q. You didn't hear Mr. Henderson testify a few moments ago?

A. I don't know who you refer to when you say Mr. Henderson.

(Testimony of Ralph A. Kearns.)

Q. It would have been a nice thing if you had been in the courtroom at the time?

A. Perhaps so.

Q. Now, Mr. Kearns, are you familiar with the property which is on the mauka side of the highway, belonging to the Damon Estate, extending from the lands which have been condemned clear down to the old Puuloa Road, about 2-1/2 miles?

A. Of course I am.

Q. They are all potential residential properties, are they not? A. I would say so, yes.

Q. About 2-1/2 miles of it?

A. Something like that.

Q. And to a depth of how much?

A. How do you mean, to a depth of how much?

Q. How far back from the road?

A. If they are in question I would say, I expect that the same depth of 150 feet, but up to this moment I never considered that portion of the land in this matter.

Q. In arriving at the market value of this property did you consider what might happen to the property if the land on the mauka side of the road belonging to this Estate were released for sale?

[367]

A. No, I didn't. I don't think they would do anything so foolish.

Q. But assuming they did?

A. Now that you ask the question, it is a correct

(Testimony of Ralph A. Kearns.)

statement for me to make that when the appraisal of this property was made by myself and two others we had in mind that it had a greater value to the present owners than to anyone else.

Q. And that value you acceded to and testified to it here? A. No.

Q. What would happen to a purchaser of this property, who had paid $335,000 for these corners, if the land on the opposite side of the road, on the mauka side, were opened up?

A. When you say $335,000——

Q. Whatever your market value was?

A. $309,000 for the land.

Q. Whatever it was?

A. I don't know that anything would happen; the land would still be there.

Q. You don't think it would influence the sale of those lots at all, the parcels to which we are now referring?

A. No, because the land on the mauka side, as far as I know, would not at any time be offered for sale.

Q. Just assume it were offered for sale,—you have no right to assume that all this property is going to be operated just the way you want it to be, —I am asking you to assume that someone else got a hold of the land on the mauka side of the road and opened it up, or some part of it, in competition to the property you are here describing, [368] what

(Testimony of Ralph A. Kearns.)

would happen to the sale of the lots here condemned, or that you say have been condemned?

A. That appears to me to be somewhat preposterous, because I know the owners of this land and have known them a long time and know the methods they adopt with their property.

Q. You had some private conversation with the trustees, as Mr. Harrison did, did you?

A. Mr. Harrison is not a trustee.

Q. I didn't say he was, I said like Mr. Harrison did, your co-appraiser?

A. I don't know what he did.

Q. You arrived at the identical figures without any collaboration? A. No that is not so.

Q. Didn't you have some conversation with the trustees as to what their program was?

A. At the outset of this matter we were presented with a large proposed subdivision of the land, which subdivision, speaking from memory, took in this land or a portion of it to which you have reference on the mauka side of the road, but knowing the tactics of the legal gentlemen and after discussion of it and all that we discarded the subdivision as hopeless.

Q. You were told to discard it?

A. We were not. Now you put the question, we gave a slight offense in the matter that we did discard it.

Q. You wanted to consider a subdivision, you

(Testimony of Ralph A. Kearns.)

thought it would be a good thing for the Estate to have a subdivision on the mauka side of the road?

[369]

A. I didn't have anything to do with it. I didn't consider it at all. I tried to tell you a moment ago that we had given a great deal of consideration to that map showing the proposed subdivision by the trustees, but we gave it up altogether, discarded it, and didn't think any more about it.

Q. Do you know the history of these lands at Moanalua?

A. In connection with what?

Q. Over this long period of time that you have been engaged in the real estate business.

A. I have known the lands of Moanalua for forty-odd years.

Q. Do you know the source of the title and the people who own it?

A. I know that the Damons have owned it for a long time.

Q. Do you know the lands on the makai side of the road which are towards Honolulu from the property condemned? A. Yes.

Q. Do you know whether or not they were under lease to the Honolulu Plantation Company prior to 1940?

A. Of my own knowledge I don't.

Q. You don't know anything about that?

A. I have no knowledge of my own about that; I may have supposed that it was in passing there

(Testimony of Ralph A. Kearns.)

and seeing it all set out in the same manner of agricultural cultivation.

Q. You don't know anything about that development on the makai side of the road as you leave the pond from Honolulu?

A. You are talking about Kaloaloa.

Q. Yes. Wasn't that under lease to the Honolulu Plantation Company? [370]

A. It is a section so-called and referred to by people who are familiar with it. I think it was and my impression is that at some time later it was released to them by the Honolulu Plantation, perhaps 165 acres. However, I may be wrong in saying 165 acres; it was some area of that character.

Q. You are employed by one of these trust companies around town, aren't you? A. No.

Q. Aren't you a casual employee of one of them for appraisals?

A. Any person who is foolish enough may employ me, but I don't get many appraisals from many trust companies.

Q. You don't get many from the Bishop Trust Company?

A. They have asked me on one of two occasions since we parted company, but I have had to decline because of having other work to do.

Q. You were formerly employed by the Bishop Trust Company? A. About twenty years.

Q. Do you know about the Bishop Trust Com-

(Testimony of Ralph A. Kearns.)

pany in subdividing Maunalani Heights, how much money they lost on that experiment up there?

Judge Robertson: Objected to as incompetent, irrelevant and immaterial, having no bearing on the issues in this case, Your Honor.

The Court: Sustained.

Q. While with the Trust Company did you learn anything about the relation between the amount a man could afford to pay for raw land and the amount he can expect to derive from it by subdividing it, in terms of percentage, and still [371] get back his investment?

Judge Robertson: Objected to unless it has some relation to the lands in question.

Mr. Courtney: Of course it has relation to the lands in question.

Judge Robertson: Please re-frame your question so the witness will so understand. The question as put is objected to.

Mr. Courtney: Let the Court rule.

The Court: Read the question.

(Thereupon the reporter read the question as above recorded.)

The Court: Overruled.

A. In my experience with the Trust Company and with real estate matters in this country I have observed that there are many opinions heard about the matter. Some people will tell you, well you have to get three to one, some will say four to one, some will say five to one, but whatever you do, whatever

(Testimony of Ralph A. Kearns.)

rate you figure in your mind there is always the possibility that you may make more than you expected and also the possibility that you may lose some money.

Q. You never heard of anyone in all your experience say that you could have a ratio less than three to one, have you?

Judge Robertson: That is objected to, Your Honor, as incompetent, irrelevant and immaterial, having no bearing on the land in question; going far away from the subject.

Q. We are going right down the line. You never, in all of your experience in the real estate business, heard anyone say that you could have a lesser ratio than three to one, did you, and still get out with your hide, in subdividing? [372]

A. Well, I don't remember if I did.

Q. And the discussions in the profession generally run as high as five to one, would they not?

A. I would not say generally, I have heard all kinds of opinions, three, four, five and so, but those opinions are worth very little in my estimation.

Q. Did you reflect the same apportionment of value on the various portions of this land as did Mr. Harrison, is his report the same as yours?

A. I suppose it is in general.

Q. Well, is it or not?

A. I supposed it was. If Mr. Harrison testified to what I have here then it is the same.

(Testimony of Ralph A. Kearns.)

Q. Didn't you collaborate with Mr. Harrison?

A. Yes.

Q. Haven't you the same report that he has?

A. I believe I have, but I didn't hear him testify.

Q. How much value did you reflect in the strip along the mauka side of this parcel 434?

A. I don't know anything about 434, Mr. Courtney, Lot "D"?

Q. This Lot C-2, the 77-acre parcel?

A. Well the entire frontage of 150 feet deep we placed an average on that of 20-cents a square foot.

Q. Twenty cents a square foot?

A. For lots.

Q. How many lots?

A. In that frontage there would be twenty-two.

Q. Twenty-two lots at 20-cents a square foot?

A. Yes.

Q. You cut up the lots, put a price on them, and added them up, is that right? [373]

A. That is correct.

Q. How many lots, how many parcels did you cut up in the rear portion of that property?

A. In the rear portion of that property we had a balance remaining of 72.7374 acres to be used as truck farming land in various sizes according to the uses of prospective buyers or takers.

Q. How many and what price?

(Testimony of Ralph A. Kearns.)

A. Well we gave a value to that area of 72 acres of $671.60 per acre.

Q. Didn't you cut it up into parcels first?

A. The truck farms, no.

Q. You didn't do that? A. No.

Q. You took a flat price per acre?

A. Yes.

Q. $671.00 per acre?

A. $671.60 or .01541 cents per square foot.

Q. Let's go over to the adjoining property, this 192-acre parcel.

A. Yes. For the frontage 150 feet deep cut into lots 60x150 feet, 20-cents a square foot, or $1800.00 for the fee of one lot.

Q. $1800.00 multiplied by the number of lots and that is how you arrived at your value?

A. For the frontage.

Q. How about the rear portion?

A. Same thing.

Q. Let's go across the road, take the gore property. A. Yes.

Q. How many lots did you cut out of that for yourself? [374] A. Seventy-seven.

Q. What price did you put on each lot?

A. 12½ cents.

Q. Did you add them up? A. Yes we did.

Q. Get your value? A. Yes.

Q. How much value did you reflect in that particular area?

A. 705,785 square feet at 12½ cents is $88,223.12.

Q. What about the balance?

(Testimony of Ralph A. Kearns.)

A. There was remaining 41.892 acres of truck farming land at a value of $671.60 per acre, or .01541 per square foot.

Q. You arrived at your valuation in this case by capitalizing what you considered the possible lease income value of this property, did you not?

A. Yes.

Q. What rate did you use? A. 5%.

Q. Throughout the property?

A. 5% for all of the so-called truck farming land.

Q. That is you subdivided the lots, added them up? A. Yes.

Q. And got a value on that and then you turned around and you capitalized it at 5%, the remaining portion?

A. The agricultural or truck farming land we capitalized at 5%.

Q. And that applied to both of these cases, is that right?

A. What do you mean by both of these cases?

Q. All the land? [375]

A. All the land that we regarded as truck farming land the same thing applied.

Mr. Courtney: I think that is all. The Government will move to strike the testimony of this witness upon the ground that it is wholly incompetent, based upon a false premise and is not a test of the market value of this property.

The Court: Overruled. Recess until called.

(Recess—10:28 a. m. to 10:46 a. m.)

(Testimony of Ralph A. Kearns.)

Judge Robertson: Mr. Kearns will you resume the stand, please.

(Witness does so.)

Redirect Examination

Questions by Judge Robertson:

Q. Mr. Kearns, you have stated upon cros examination that the willing buyer, at the value you have stated, could make from 16% to 22% on his investment, do you apply one rate of profit to one section and another rate of profit to another section, or do you say on the whole investment a willing buyer could realize between 16% and 22%?

A. Yes.

Q. Which?

A. On the figures shown that for Lot "D" by itself, if it should be offered for sale based on the figures that I have indicated, a buyer would make approximately 16%, but when I make that statement I would like, if I am permitted to do so, add something to it, and that is this: A buyer of this property in November, 1940 would gain possession of it, one portion of it, in April of this year. [376]

The Court: This year?

Witness: This year. Lot "D", and the balance of the land the lease expires, as I understand it, in December, 1943. If this statement be correct I would like to say that in my opinion that by the time the man actually received these lands and com-

(Testimony of Ralph A. Kearns.)

menced to operate, particularly with reference to Lot "D" and Lot C-3-A, it is very well within the realm of possibility that he might make considerably more by reason of the advance in value of the whole parcel.

Q. In the meantime? A. In the meantime.

Q. Would that factor enter into the mind of the willing buyer as of November, 1940?

A. If he were a man of this community it would.

Q. In other words, if he was a man who knew what he was doing?

Mr. Courtney: That is objected to as leading and suggestive, I don't see that any such conclusion can be drawn from the testimony of this witness.

Q. My question started out, Mr. Kearns, when asking you your reason for stating two rates of profit, one at 16% and the other at 22%, my question was whether the 16% applied to some particular portion of the area and the 22% profit to another portion of the area, or whether by saying 16% to 22% you mean that the willing buyer would make between 16% and 22% on his investment, which is it?

A. Lot "D" of this area, under the figures indicated by me, would make approximately 16%.

Q. You have already stated that, where does the buyer's profit of 22% come in? [377]

A. Under the figures stated by me for Lot C-3-A, etc., if the buyer paid $182,058 plus the

(Testimony of Ralph A. Kearns.)

expenses as set forth and sells for $248.030, he realizes approximately 22.47%.

Q. I ask you to repeat what portion of the area that refers to?

A. The big lot, 192 plus acres.

Q. And on the 77-acre area, what would your figure for profit on that be?

A. About 20%.

Q. You have stated on your cross examination that the willing buyer would be able to realize on his whole purchase of the 331 acres in two or three years after the expiration of the lease in 1943, have you?

A. I stated that in my opinion the whole thing of 331 plus acres would be disposed of between two and three years after the expiration of the lease which terminates in December, 1943, and if I remember correctly I said as to Lot "D", which he would get in April of this year, that it was my opinion that he would be rid of that within eighteen months. I think that is what I testified.

Q. Now then, have you taken those facts into consideration in giving these values which you have stated a willing buyer would have been prepared to pay for these areas? A. Yes I think so.

Q. Do you understand that until the termination of the lease in 1943 the willing buyer having purchased in November, 1940, would receive the rent that that lease calls for? A. Yes.

Q. Have you taken that into consideration?

(Testimony of Ralph A. Kearns.)

A. Yes sir. [378]

Q. You have stated on your cross examination that the trustees showed you a plan of a proposed subdivision, what area did that have reference to?

A. As far as I remember it took in the lands about which we have been discussing and also land on the mauka side of the road.

Q. And when you say land on the mauka side of the road is it that you refer to? A. No.

Q. Did this proposed plan that was shown to you cover also Lot "D"? A. Yes.

Q. On cross examination you also referred to these varying opinions that you mentioned that different people have as to the ratio of value between subdivided land and raw land, did you not?

A. Well, what I intended to convey was that during the extent of my experience in real estate matters in this community I have had and heard many discussions by real estate men and others as to what the gross realization should be from the land when subdivided as against what your purchase price might have been.

Q. By that do you have in mind the value of undivided land as compared to the value of a similar area already put into subdivision?

A. No, I meant to convey this, that the conversations that I referred to among various people during these years, if you bought a piece of land, of undeveloped land and you subdivided it and sold it in lots you would have to make or realize a total

(Testimony of Ralph A. Kearns.)

gross realization three times, four times, [379] five times what the original plot of land cost you.

Q. I see, what the undeveloped land cost as to what it could be sold for after subdividing?

A. Yes.

Q. Have those various theories any application to the areas we are talking about in this case?

Mr. Courtney: I think that is objected to as incompetent.

Judge Robertson: Counsel objects to everything as incompetent; we are entitled to find out what the witness had in mind when the questions were put to him on cross examination.

The Court: Overruled.

Judge Robertson: Read the question.

(Thereupon the reporter read the question as above recorded)

A. Well, these theories have application to the land about which we are talking in this respect, it is very difficult to conceive of any man being familiar with the property buying either parcel unless he were well convinced in his own mind that he could certainly make some profit out of his buying.

Q. That would determine what the willing buyer would be willing to pay?

A. That and what his idea was for the demand and, therefore, the rapidity with which he could be rid of the parcel he bought.

(Testimony of Ralph A. Kearns.)

Q. I was trying to find out what application these various theories of 3 to 1, 4 to 1, and 5 to 1 have,—what application do these theories have to the land we are talking about in this case, if any?

[380]

A. I didn't give any thought to that as it refers to this land.

Q. So this discussion that Mr. Courtney spoke about to you is not connected in any way with your opinion as to the value in this case, is that correct?

Mr. Courtney: If the Court please, I submit that the witness' testimony should be permitted to stand for what it is worth, and this is an attempt to impeach the witness' testimony; it is also objected to as leading and suggestive.

Judge Robertson: I am not trying to impeach anyone.

Mr. Courtney: It is both leading and suggestive. The witness has already given his testimony of values, he has limited his profit and he has told his fair market value based on that scale. Now, the testimony was, he was asked what the experience of the profession was with relation to subdivisions and the price or ratio that could be afforded between raw land and ultimate selling prices as contrast, that is his own testimony.

Judge Robertson: Mr. Courtney, unfortunately, is not above endeavoring to confuse a witness, Your Honor. I objected to Mr. Courtney's question when the question was put on the ground that it is a

(Testimony of Ralph A. Kearns.)

hypothetical question about the ratio of values of 3 to 1, 4 to 1, 5 to 1. As the question was put it was not connected with any issues in this case, in other words, it had no reference to the lands we are talking about in this case. That objection was overruled and the witness was required to answer that hypothetical question. I submit I am clearly entitled on redirect to show that in answering that objectionable question that was put in the mind of the [381] witness it had no practical application to the values he puts on these lands involved here.

Mr. Courtney: I beg to differ with my learned colleague that the question was objectionable because the Court ruled it was admissible and the witness answered it.

Judge Robertson: I have stated that my objection was overruled, Your Honor, I am clearly entitled——

The Court: You can go into it further, the objection is overruled.

Judge Robertson: Read the question to the witness, please.

(Thereupon the reporter read the question as above recorded.)

A. The statement that I made about what I heard from others about the necessity of using 3, 4 or 5 to 1, has nothing to do with this case or our consideration of it; it was never at any time discussed or mentioned by us. I did say I believe, in reply to a question put to me here, that I wanted to enlarge a little on my statement, and that was

(Testimony of Ralph A. Kearns.)

this, that in all probability, in my opinion, the land when it came actually into the possession of this willing buyer would have increased in value to an extent that he would make more profit, 16, 17, 18 or 22%, as the case may be. I think if the testimony is examined you will find some reply of that character.

Q. You have also stated, Mr. Kearns, that you used the rate of 5% capitalization on that part of the area that you denominated adaptable to truck farming, in giving that answer you gave 5% rate of capitalization of what? [382]

A. Well, in the case of the truck farms upon the rental.

Q. In other words, in arriving at the value to the willing buyer of the truck farming area you capitalized the rental value at the rate of 5%, is that it? A. Yes.

Judge Robertson: That is all.

Mr. Courtney: That is all, Mr. Kearns.

ALBERT WATERHOUSE

being first duly sworn as a witness for the defense testified as follows:

Direct Examination

Questions by Judge Robertson:

Q. Will you state your name, please.

A. Albert Waterhouse.

(Testimony of Albert Waterhouse.)

Q. Do you live in Honolulu? A. Yes sir.

Q. How long have you lived in Honolulu?

A. 61½ years.

Q. Do you know the land of Moanalua on this Island? A. Yes sir.

Q. State whether or not you have a lease from the trustees of the Damon Estate of a portion of the land of Moanalua?

A. I have three leases.

Q. How long have you held those leases?

A. The first one was in 1937, the second in '38 and the third in '39, '37, '38 and '39.

Q. What area of land is covered by these leases?

A. A little over 11½ acres altogether.

Q. Have you possession of 11½ acres? [383]

A. No I only have use at the moment of a little more than nine acres.

Q. What accounts for the difference between 9 and 11½ acres?

A. The balance of the area is subject to the lease of the Damon Estate to the Honolulu Plantation, I take possession at the expiry of the lease.

Q. What term of years have you on these leases from the Damon Estate?

A. The first lease in 1937 was for 25 years, I think the date was in April, which would make it expire in April, 1962, the other two leases terminate on the same date for shorter periods.

Q. They all three are co-terminous?

A. Yes sir.

(Testimony of Albert Waterhouse.)

Q. Do the three pieces of land covered by those three leases make a solid block of land, contiguous?

A. With roadway in between it is a solid area.

Q. When you took these leases of this land, was the land subdivided?

A. I think a small portion of it was subdivided.

Q. Any of it improved land?

A. Decidedly not.

Q. Upon obtaining these leases what did you do with the land?

A. I cleared the land and improved it for cottages.

Q. Did you do any further subdividing?

A. Yes.

Q. Consisting of what?

A. I cut the property up into lots with the consent of the Damon Estate; I think I made 82 lots of it. [384]

Q. Did that involve the putting in of any more roadway?

A. Not on my part, the Damon Estate put the roadway in.

Q. What rent do you pay for that land?

Mr. Courtney: Objected to as incompetent and immaterial.

Judge Robertson: This land is in the immediate vicinity.

The Court: Just what immediate vicinity? I don't recall that it has been described or defined.

(Testimony of Albert Waterhouse.)

Judge Robertson: You mean the exact location, Your Honor?

The Court: Yes.

Judge Robertson: There is a map here *with* I understand Mr. Courtney wants to substitute for Government's Exhibit "B",—if that is going to be done I suggest it be done now so I can use this map in talking to this witness. Mr. Courtney, do you ask that this Exhibit, or rather this map be substituted for Government's Exhibit "B" already in evidence?

Mr. Courtney: I do, and I ask that the testimony of the witness heretofore called when he referred to this——

The Court: I don't care to have the Exhibit put in and put before the jury and testified to withdrawn; you may put this in as an additional Exhibit, Exhibit "C".

Judge Robertson: Although I am offering it, I understand that this is Government's Exhibit "C".

Mr. Courtney: It doesn't make any difference who puts it in.

The Court: It may be received in evidence and marked Government's Exhibit "C". [385]

(Thereupon the map referred to was received in evidence and marked Government's Exhibit "C").

Q. Will you look at this map, Mr. Waterhouse, and see if you recognize it (exhibiting to the witness Government's Exhibit "C")? A. Yes Sir.

(Testimony of Albert Waterhouse.)

Q. Can you identify on this map the land that you have under lease from the Damon Estate?

A. It is the piece right next on the Honolulu side of block marked Field 107, runs from Field 107 up to John Rodgers Airport Road.

The Court: Would it be contained on that map that is on the blackboard, Government's Exhibit "A"?

Judge Robertson: This area is not on Exhibit "A", Exhibit "A" shows the lands that are being condemned in this case.

The Court: It shows the road to the airport.

Judge Robertson: It runs as far as the airport road, Your Honor.

Q. Mr. Waterhouse, do you mind marking the area you have pointed out on this map (indicating Government's Exhibit "C") mark it A. W. which would signify Albert Waterhouse,—mark it in good sized letters.

(Witness does so.)

Judge Robertson: The witness has identified this area here (indicating on Government's Exhibit "C" to the jury) this being John Rodgers Airport Road, this being the highway.

Juror: Can that location be pointed out on this map (indicating Government's Exhibit "A") Judge Robertson?

Judge Robertson: Not on this. [386]

Juror: The road is there (Indicating Government's Exhibit "A").

(Testimony of Albert Waterhouse.)

Judge Robertson: The road is there but not the area; that map stops at the road (indicating Government's Exhibit "A").

Juror: Isn't that area on the Pearl Harbor side of the road?

Judge Robertson: Yes. Here is the gore lot up here (indicating a point on Government's Exhibit "C"), here is the road going down into it.

Juror: We just wanted to know.

Judge Robertson: (Exhibit Government's Exhibit "C" to the jury). This comes down from Hickam Field; here is Mr. Waterhouse's *are* as he says between Field 107 and the John Rodgers Airport Road.

Juror: Does this map (indicating Government's Exhibit "C") indicate the limit of the land that is being condemned on this side of the road?

Judge Robertson: Here is the gore lot (indicating a point on Government's Exhibit "C"). Here is the area that is condemned. That would be the end of the condemned area on the town side.

The Court: May I be informed as to that location; I want to know in order to pass on the objections.

Judge Robertson: I beg your pardon.

The Court: I am not familiar with the land.

Judge Robertson (Exhibiting to the Court Government's Exhibit "C") There is a road, here is the road toward town, here is the John Rodgers

(Testimony of Albert Waterhouse.)

Airport Road, and here is the area held by Mr. Waterhouse.

The Court: Objection overruled. [387]

Q. The question was, Mr. Waterhouse, what rental per annum do you pay for that area that you hold under lease?

Mr. Courtney: Same objection.

The Court: Same ruling.

A. $80.00 a year per acre.

Q. Who pays the taxes?

A. I pay the taxes.

Q. $80.00 per annum per acre net to the Damon Estate? A. Yes Sir.

Q. Having obtained that lease, or those leases, what did you proceed to do with the land?

A. I cleared the land and put up cottages. I now have 58 cottages on the land.

Q. What do you do with the cottages?

A. I rent the cottages to enlisted service men, Navy people.

Q. Exclusively?

A. That is my present rule, I limit my tenancy to the enlisted personnel of the Navy; I don't rent to Warrant Officers to officers or to civilian employees or to many others.

Q. Do you rent any to those employed locally, local population? A. No Sir.

Q. What, if any, domestic water supply does your area have?

(Testimony of Albert Waterhouse.)

A. I get my water from the service rented by the Damon Estate.

Q. Artesian water? A. Artesian water.

Q. Is that water included in your rent or not?

A. No, I purchase that. [388]

Q. Does that Damon Estate charge you water rates for the water so supplied? A. Yes Sir.

Q. How do the Damon Estate water rates compare with the City water rates?

Mr. Courtney: I think that is immaterial, Your Honor.

The Court: I think that is a little far afield; sustained.

Q. After having obtained the leasehold of that area, Mr. Waterhouse, did you make any attempt to acquire an additional area?

A. At the time I made application I wanted area enough to put 100 cottages, but this was the only available land I could get in the neighborhood, in the location that I wanted.

Q. What location did you want?

A. I wanted to get near the Navy Yard.

Q. Where would that be on this map, Government's Exhibit "C"?

A. I wanted to get an option on additional area over into this part (indicating on Government's Exhibit "C") ewa, which extended it to Field 207 or into this area up here, which is Field 91, between my property and the Dillingham Boulevard.

Mr. Courtney: That testimony is objected to; I

(Testimony of Albert Waterhouse.)

couldn't get my objection in before the witness answered. It is hearsay, speculative, and conjectural. I move to strike the same.

Judge Robertson: I submit it is proper evidence.

[389]

The Court: You had better get your map down here where it would be of some use to the jury, the witness is running his hand over the map and the jury has no way of seeing what he is doing.

Judge Robertson: I had in mind attending to that if opposing counsel will give me a little opportunity——

Mr. Courtney: I will when the Court has ruled.

The Court: The answer was that he had endeavored to acquire other land near to Pearl Harbor.

Judge Robertson: Will you please read the question.

(Thereupon the reporter read the question as above recorded.)

Judge Robertson: The reporter has read "Field 207" should that be 207 or 107, Mr. Waterhouse?

Witness: 107.

Mr. Courtney: The objection is to the competency of the evidence first.

Judge Robertson: (Exhibiting to the jury Government's Exhibit "C") What the witness has pointed to is the area marked Field 107 which immediately adjoins the area he has under lease; he secondly pointed to another field shown on this map and marked Field 91 which adjoins the area held by

(Testimony of Albert Waterhouse.)

him under lease on the other side, so that he has pointed here to two areas of land one of which adjoins one side of his leasehold and the other the other side of his leasehold.

Mr. Courtney: In the orderly conduct of the business of this Court I would like to have an opportunity to complete the Government's objection. I stated that the evidence was incompetent, that is one. I stated also [390] that the evidence was speculative and conjectural. We are not permitted to go into individual intent of anyone to what they had done or had planned to do; this is a case which must be treated not on the personal desires of any one individual, whoever he may be, but on the fair market value of the land. That is the purpose and reason for the objection. I didn't have an opportunity to interpose the objection before the witness answered and I, therefore, must make the objection and motion to strike.

The Court: Overruled.

Q. Is the substance of your testimony, Mr. Waterhouse, that you desired to acquire an additional area under lease either on the second mark on the map, Government's Exhibit "C", Field 107, or Field 91? A. Yes Sir.

Q. Judge Robertson (Exhibiting Government's Exhibit "C" to the jury): Here is Mr. Waterhouse's present area, here is Field 107 adjoining this side of his leasehold and here is Field 91 adjoining this side of his leasehold.

(Testimony of Albert Waterhouse.)

Q. At that time, Mr. Waterhouse, did you know of any demand for additional areas of lots of the kind that you had already put in on your leasehold? A. You are referring to 1937-38?

Q. I am referring to whatever time it was that you had this ambition to acquire an additional area from the Damon Estate?

A. Yes, there was demand for property of that kind.

Q. What was the obstacle to your obtaining an additional area at that time from the Damon Estate?

Mr. Courtney: Objected to as incompetent and irrelevant and for the same reasons already stated. [391]

The Court: Overruled.

A. Probably because the land was under lease, as far as I could find out, that the Damon Estate did not care to tie the land up until the expiration of the sugar lease.

Q. You refer to the lease of the Honolulu Plantation? A. Yes Sir, for the sugar areas.

Mr. Courtney: Additional objection, it is the conclusion of the witness, and I move to strike it for that reason, it is also hearsay.

The Court: I misunderstood the question if the answer was directed to the question. I understood the question to be what was the witness' object in wanting to acquire additional land.

Mr. Courtney: He said what obstacles.

(Testimony of Albert Waterhouse.)

Judge Robertson: There are two elements, the first was there was the existence of a demand for more cottages like the witness had which prompted him to want to acquire additional area. He didn't succeed in acquiring that additional area. My question to the witness was for an explanation of the reason why he did not get from the Damon Estate what he then wanted. His answer was that the land was under lease to the plantation.

Mr. Courtney: I think he said it probably was. Isn't that what you said?

Witness: I said probably was.

The Court: The answer is stricken, the jury will disregard it.

Judge Robertson: You may cross-examine.

Mr. Courtney: I have no questions of Mr. Waterhouse.

The Court: The Court is required to take a short recess at this time.

(Recess—11:30 a. m. to 11:40 a. m.) [392]

Judge Robertson: Mr. Damon will you take the stand please.

SAM R. DAMON

being first duly sworn as a witness for the defense testified as follows:

Direct Examination

Questions by Judge Robertson:

Q. State your name please.

A. Sam R. Damon, Sir.

Q. You are related to Samuel M. Damon, please state what? A. I am a grandson, Sir.

Q. Are you a beneficiary of the trust estate created by your grandfather's Will?

A. I am, Sir.

Q. Where do you live? A. Moanalua, Sir.

Q. In what direction from the lands involved in this case? A. Mauka, Sir.

Q. Are you familiar with the lands of Moanalua in general? A. I am, Sir.

Q. Are you familiar with the affairs of the trust estate? A. I am, Sir.

Q. How do you keep yourself familiarized with the affairs of the trust estate?

A. I am invited to attend trustee meetings and I receive a copy of the annual accounts, Sir.

Q. Are you in the habit of attending the meetings of the [393] trustees of the Damon Estate?

A. Whenever I am present on this Island, Sir.

Q. Are you familiar with any subdivisions made at Moanalua by the trustees of the estate?

A. I am, Sir.

Q. Were there more than one of such subdivisions? A. There were, Sir.

(Testimony of Sam R. Damon.)

Q. Are those subdivisions indicated on this map, which is Government's Exhibit "C"?

A. They are, Sir.

Q. Perhaps you had better stand down here.

The Court: There is a pointer on the blackboard if you want to use it.

Judge Robertson: If this map could be put on the blackboard it might be a convenience.

The Court: All right, put it on. I think for the time being you can put it over the other Exhibit which isn't in use now.

Judge Robertson: Can the jury see the map?

Jury: Very well, Sir.

Q. State whether or not there were more than one subdivisions? A. Yes, there were, Sir.

Q. In point of time will you indicate on this map, Government's Exhibit "C", the first subdivisions to be put on the market by the Damon Estate trustees?

A. This portion outlined in red here, Sir, was known as Shibata. It was put on in 1924. (Witness indicates an area on Government's Exhibit "C").

Q. Will you mark that area 1924. [394]

(Witness does so.)

Mr. Courtney: We object to this, of course, Your Honor, as immaterial and incompetent under the previous objection to this line of testimony.

The Court: As to the openings of these subdivisions overruled.

(Testimony of Sam R. Damon.)

Q. Do you know the area of that subdivision?

A. Yes Sir. The area of that subdivision is 9.5538 acres.

Q. The next subdivision put on the market by the Damon Estate, where was that situated?

A. That is makai of the railroad track and this is the area here outlined in red (witness indicates an area on Government's Exhibit "C").

Q. When was that put on the market?

A. 1929, Sir.

Q. Please mark it 1929 in good sized figures.

(Witness does so.)

Q. What was the area of that?

A. 121.532 acres.

Q. Where is the location of the next subdivision put on the market by the Damon Estate?

A. The next subdivision is in the ewa direction, still makai of Dillingham Boulevard, and was put on in 1933, Sir.

Q. Is that area outlined on this map?

A. It is, Sir. That area is outlined in red here, Sir. (Witness indicates an area on Government's Exhibit "C") It is North of John Rodgers Airport, extending beyond John Rodgers Airport Road and is below Dillingham Boulevard.

Q. And that was put on in 1933? [395]

A. Yes Sir, 1933.

Q. Please mark that area 1933.

(Witness does so.)

Q. What was the acreage of that subdivision?

(Testimony of Sam R. Damon.)

A. The acreage of that subdivision was 178.695 acres.

Q. What other subdivision was put on the market by the trustees of the Damon Estate?

A. The next one was the Albert Waterhouse Subdivision put on in 1938, Sir, as outlined in red here with the letters A. W. (Witness indicates an area on Government's Exhibit "C").

Q. State whether or not all of those areas of subdivisions are fully occupied by tenants?

A. They are, Sir.

Q. When the trustees put those subdivisions on the market did they put on lots for sale or lots for lease? A. They put on lots for lease, Sir.

Q. Were all those subdivisions fully occupied by tenants prior to November, 1940?

A. They were, Sir.

Q. Do you know whether or not at that time there was any demand for further subdivided lots at Moanalua? A. There was, Sir.

Q. About how long had that demand been continuing?

A. There had been an increasing demand throughout the last five years, Sir.

Q. Do you know what has caused that demand?

A. In my opinion that demand was caused first by the building,—one of the causes was the building of Hickam Field, the gradual enlargement of the Navy, and also the [396] gradual increase in the population of Honolulu.

(Testimony of Sam R. Damon.)

Q. The area now included in Hickam Field was acquired by the United States Government by a condemnation proceeding, was it not?

A. Yes Sir.

Q. When was that?

A. Condemnation proceedings I believe took place in 1933.

Q. Do you attribute the development of Hickam Field as one of the causes of this demand for subdivisions in Moanalua? A. I do, Sir.

Q. Since Hickam Field was established in 1933 has there been also a development in the Naval line at Pearl Harbor?

A. By development do you mean increase in its size, I don't understand what you mean by the word "development"?

Q. In a general way, in personnel increase, in traffic, increase of civilian employees, or anything of that kind.

A. From the figures that had been made available to me which doesn't include the Navy personnel or the Army personnel, or anything of that sort, my observation of the traffic conditions and the number of cars going into the Navy Yard and Hickam Field has shown a marked increase intimating that the Navy Yard's demand for labor has increased.

Q. In what way would that contribute to the demand for home sites at Moanalua?

A. From the various applicants for home sites that have come to my attention it has usually been

(Testimony of Sam R. Damon.)

brought out in their conversation with me that proximity to place of work is one of the factors.

Q. You have spoken of the demand for more home sites [397] at Moanalua, state whether or not there has also been a demand for small truck farming areas?

A. Yes, I have had applications for truck farming areas there.

Q. Was that demand in existence at and prior to November, 1940? A. Yes Sir.

Q. In partial response to those demands do you know of any plan the trustees of the Damon Estate entertained with reference to the gore lot, also called Lot "D" on the map here?

A. I do, Sir.

Q. What was that arrangement?

Mr. Courtney: That is objected to, Your Honor, incompetent, irrelevant and immaterial, speculative and conjectural, no bearing on any issues in this case. The intentions of the owner, whatever they may have been, are not material in determining the market value, but the uses for which the property was adapted and not the particular use which the owner purports or proposes to make of it, if any.

Judge Robertson: On the contrary, the authorities on the subject tell us that in determining market value the jury should take into consideration the highest, best and most profitable use that the land in question was adapted for at the time it was taken by the Government.

(Testimony of Sam R. Damon.)

The Court: Overruled.

A. The trustees contemplated a subdivision of that area placing a portion of it to be made available for business sites and the remaining portion to be used for home sites. [398]

Q. The question was, Mr. Damon, what steps the trustees took with reference to the gore lot?

Mr. Courtney: The same objection, Your Honor.

The Court: Overruled.

A. To my knowledge and in my company one of the trustees went to the Navy Yard and spoke to Admiral Bloch and asked Admiral Bloch——

Mr. Courtney: This is also objected to as hearsay, of course.

Q. The question is this, whether the trustees arranged with the Honolulu Plantation Company for the surrender or possession of the gore lot?

A. They did, Sir.

Q. When was that arranged?

Mr. Courtney: Same objection.

The Court: Overruled.

A. They negotiated prior to July, 1940 and the negotiations were closed in July and at that time the result of those negotiations was that that land was to be made available to us not later than April, 1941, Sir.

Q. In other words, that the lessee would surrender possession in April, 1941?

A. Yes Sir.

Q. Do you know whether or not it was in pur-

(Testimony of Sam R. Damon.)

suance of that understanding had with the Honolulu Plantation Company that the trustees prepared a subdivision plan for the gore lot?

Mr. Courtney: Objected to as incompetent and irrelevant, speculative, conjectural, calling for the conclusion of the witness; it is wholly immaterial and injecting an element which under no conceivable stretch [399] of the imagination can be introduced. Now, I am making my objection as violent as I can. If the Court wants me to cite authorities I shall be glad to do so.

Judge Robertson: We are interested here in the evidence of this case not on theories of brother counsel.

Mr. Courtney: I am relying on the law.

Judge Robertson: The evidence shows without contradiction the demand, the growing demand for more subdivisions at Moanalua, and in that immediate connection we are at liberty to show by this witness that to meet that demand the trustees proposed to do certain things, all of which has an immediate bearing upon the highest, best and most profitable use to which that area was adaptable in contradistinction to those theories of the Government's witnesses that that was an area of mere cane land; that is the exact issue in this case, Your Honor.

The Court: It was ruled on a long time ago.

Judge Robertson: Was counsel's objection overruled, Your Honor?

(Testimony of Sam R. Damon.)

The Court: Yes.

Q. Was the last question answered?

Reporter: No.

Judge Robertson: Please read the question.

(Whereupon the reporter read the question as above recorded).

A. They prepared a subdivision plan before the negotiations with the Honolulu Plantation.

Q. You have stated that the gore lot was proposed to be put on the market partly as home sites and partly as business property, in connection with the latter, that is the business property, were you authorized by the trustees to make any [400] investigation? A. I was, Sir.

Q. An investigation of what?

A. The demand for business property, Sir, in that vicinity.

Q. Pursuant to that what did you do?

A. I approached a group of representative business men here and asked them if they would be interested in leasing a restricted business area in that vicinity, in the gore lot.

Q. By restricted business area what do you refer to?

A. By restricted business area I refer to the restricting to but one classification, one tenant to each classification of business.

Q. From your investigation did you or did you not find that there would be a demand for a busi-

(Testimony of Sam R. Damon.)

ness section in the gore lot if and when it were put on the market?

Mr. Courtney: Same objection, and also upon the ground that it is incompetent, this is supposed to be a free market we are dealing with.

The Court: Overruled.

Judge Robertson: I am willing to have a continuing objection to everyone of my questions to avoid these constant interruptions by counsel.

Mr. Courtney: You know I have to make an objection whenever the line of testimony changes; you don't mind if I protect the interests of the Government as well as I am able to.

Judge Robertson: Not at all.

A. In my opinion there was such a demand, Sir.

[401]

Q. These various subdivisions heretofore put on the market by the Damon Estate from 1924 to 1939, do the occupants of those subdivisions have a domestic water supply? A. They do, sir.

Q. Where do they get it?

A. Supplied by the Damon Estate, sir.

Q. Is that artesian water? A. Yes sir.

Q. Is that domestic water supply furnished as part of the rental paid by the tenants or in addition to rental?

Mr. Courtney: Objected to as immaterial.

The Court: Overruled.

A. It is furnished in addition to their rent, sir, at additional cost.

(Testimony of Sam R. Damon.)

Q. In other words, the tenants pay the water rates? A. That is right, sir.

Q. What class of tenants has the Damon Estate on the 1924 subdivision?

A. At the time the 1924 subdivision was opened we were able at that time to interest pig tenants, to raise pigs.

Q. What nationality? A. Japanese.

Q. Does that nature of tenancy stil continue or not?

A. They are prohibited now from raising pigs, and most of the tenants are the original tenants and they have swung over to poultry to a large extent.

Q. What sort of tenants does the Damon Estate have on the 1929 subdivision?

A. At the time that subdivision was opened there were a few pig tenants, a few vegetable growers, a few flower [402] growers, the rest used it as their home sites; since then pigs have been prohibited.

Q. By flower growers you mean flowers for sale in the market?

A. For market purposes, either leis or as cut flowers.

Q. What kind or race of tenants occupied the 1929 subdivision?

A. Japanese, Chinese, Hawaiian, and mixtures. There are a few haoles down there.

Q. As to the 1933 subdivision what class of tenants does the Damon Estate have there?

(Testimony of Sam R. Damon.)

A. We have a few small farmers who raise chickens, the rest are home owners who are employed either down town in business or at the Navy Yard or Hickam Field.

Q. That is some are civilian employees of the Army or Navy and some are local residents, is that it? A. Yes sir.

Q. Mr. Waterhouse has stated that the tenants on his area are enlisted Navy personnel, do you confirm that? A. That is correct, sir.

Judge Robertson: You may cross examine.

Cross Examination

Questions by Mr. Courtney:

Q. Mr. Damon, you have been familiar with the Moanalua tract all of your life, of course?

A. Yes sir.

Q. Do you know the source of the title?

A. Yes sir.

Q. What was it?

A. The source of the title was, my grandfather bought [403] certain portions of that land and then received a title to the Ahupuaa of Moanalua over and above the portions that he had already acquired by purchase.

Q. How much had he owned before he received the land?

A. Iam not familiar with the exact area.

Q. As a matter of fact he got it all from the Will of Bernice Pauahi Bishop?

(Testimony of Sam R. Damon.)

A. I don't think that statement is exactly correct.

Q. In what respect is it incorrect?

Judge Robertson: I question the admissibility and relevancy of this, what bearing on the value of this property as of November, 1940, has the past title of this land going back fifty, sixty or eighty years perhaps.

Mr. Courtney: I want to develop it further.

Judge Robertson: It certainly has no relevancy on the issues of this case, which is the market value in November, 1940.

Mr. Courtney: I want to develop it further.

Judge Robertson: I don't care if you want to develop it further, it is developed too far already, how much of this land was bought by Mr. Damon and how much he acquired some other way the Lord knows how many years ago, what we are dealing here with is November, 1940 not 70 or 80 years ago.

Q. Let's put another question——

Judge Robertson: I object to this line of questioning, it is irrelevant, incompetent, having no bearing on any of the issues in this case.

Q. In any event, Mr. Damon, this Ahupuaa of Moanalua——

Judge Robertson: Has Your Honor ruled?

[404]

Mr. Courtney: I withdrew the question.

Judge Robertson: If counsel would say when he withdraws his questions it would save a lot of time and motion.

(Testimony of Sam R. Damon.)

Mr. Courtney: I can't always get a word in.

Q. In any event, this Ahupuaa of Moanalua has been in the possession of your ancestors and your family and the trustees for your family for a great many years, has it not? A. Yes sir.

Q. And its use is absolutely limited to your desires with respect to it?

(No answer by the witness.)

Judge Robertson: Was it answered?

Reporter: The witness did not answer it.

Mr. Courtney: I withdraw it.

Q. How long has the Damon Trust been in existence? A. Well, probably 1924.

Q. About 1924?

A. Upon the death of my grandfather.

Q. Since that time the trustees have been in control of the property?

A. That is right, sir.

Q. The Honolulu Plantation Company has had a lease from your grandfather, has it not, for some period of years?

A. Started with my grandfather.

Q. Started with your grandfather, and for how long a term was that lease?

A. I am not familiar with the original lease, sir.

Q. You don't know the original lease?

A. No.

Q. Now as to the existing lease, what is its termination? [405] A. December, 1943.

(Testimony of Sam R. Damon.)

Q. It has been in existence how long?

A. Fifteen years.

Q. Fifteen years to December, 1943?

A. Yes sir.

Q. Are there provisions for the withdrawal of land in that lease?

A. There were provisions and they were exercised, sir.

Q. You were given a limited number of acres which you could withdraw?

A. There was a parcel of land described which we had the option of withdrawing in 1933, which we did, and that is known as the 1933 subdivision on that map.

Q. Prior to that time the land occupied by these subdivisions were used by the Honolulu Plantation Company, were they not?

A. Under their lease, sir.

Q. And gradually you withdrew until 1938 the last of——

A. We didn't withdraw in 1938, Mr. Albert Waterhouse made a private negotiation with the Honolulu Plantation and bought out their cane interests subject to the approval of the trustees.

Q. Then the last subdivision which you made was the subdivision of 1933?

A. No sir, 1938.

Q. I thought you said that——

A. I said a portion of this area, a portion was in direct ownership of the trustees unencumbered

(Testimony of Sam R. Damon.)

by any lease and the other portion was encumbered by a lease to the plantation.

Q. Between the two of them he got a lease?

[406]

A. Right, sir.

Q. Now your property has been built up to a very large extent, has it not, as you testified, by the personnel of the Navy and the Army at Pearl Harbor and Hickam Field?

A. Yes sir, and the increasing population of Honolulu.

Q. More particularly every time the Navy has developed any area in the vicinity of your property you have been a beneficiary?

A. That is conjecturory, sir.

Q. You don't think the presence of those great establishments which you spoke of a moment ago reflects itself at all in your land? In the value of your land?

A. That was not your original question.

Q. Do you or do you not think it reflects itself in the value of your land?

A. According to your new question I would say the lands do benefit some.

Q. And now, Mr. Damon, on this Government Exhibit "C", which is on the blackboard here, there are certain areas marked out in red pencil,—I think most of it is green and field numbers on it, those are the fields of the Honolulu Plantation are they?

A. Those numbers refer to their field numbers.

(Testimony of Sam R. Damon.)

Q. For quick and ready reference tell us the total number of acres in this area?

A. I think we agreed it was approximately 600 acres, 590.

Q. That is exclusive of the area which is condemned, is that right?

A. That is the area North or mauka of Kamehameha Highway, sir. [407]

Q. And not condemned, 590 acres?

A. Not as yet, sir.

Q. There is also an area marked Field 91 which is not condemned?

A. Field 91 and a portion of Field 92 and Field 107 are not as yet condemned, still belong to us.

Judge Robertson: Still under lease.

Witness: Still under lease, yes sir.

Q. How many acres in that area, do you recall, roughly? A. No, I haven't got that.

Q. Can you approximate it? A. No.

Q. In any event it is still yours?

A. No, not mine, the Trustees'

Mr. Courtney: I think that is all, Mr. Damon, thank you.

Judge Robertson: That is all, Mr. Damon. Thank you.

The Court: Do you have any other witnesses, Judge?

Judge Robertson: Yes, Your Honor, two more.

The Court: Today is Friday noon, do you want

to hold session tomorrow or continue until Monday?

Mr. Courtney: I think, if Your Honor please, for the convenience of every one concerned we should adjourn until Monday. I think we will finish the case Monday or Tuesday.

The Court: I believe it is safe to say in that connection you speak for the jury, isn't that so?

Jury: Yes.

Judge Robertson: I am willing to leave it to the jury.

The Court: They have expressed themselves. Court is adjourned as to these cases until Monday morning, July 28th, 1941, at 9:00 o'clock

(Adjourned—12:20 p. m.) [408]

On Monday, the 28th day of July, 1941, at the hour of 9:07 o'clock a. m., all parties being present in the courtroom, the following further proceedings were had:

The Clerk: Civil 434 and 436. Cases called for further trial.

The Court: The jury are in the box.

Judge Robertson: I would like to recall Mr. Damon for further questioning.

Mr. Courtney: No objection.

SAM R. DAMON

having been previously sworn as a witness for the defense, testified further as follows:

Direct Examination

Questions by Judge Robertson:

Q. Mr. Damon, were you familiar with the character of the soil in that area that Albert Waterhouse leased from the trustees?

A. I was sir.

Q. How does the character of that ground compare with the character of the ground involved in these 331 acres we are talking about?

Mr. Courtney: If the Court please, we will have to object to that as incompetent, no foundation laid for it.

The Court: Overruled.

Q. You may answer the question.

A. The general character of the soil in the Waterhouse section as compared with the soil conditions in the two cases under consideration roughly divides itself into this fact: In the Waterhouse Subdivision it was coral outcroppings with dirt pockets. That condition does not exist in the two cases under consideration. [409]

Q. Do you know what, if anything, Mr. Waterhouse did to improve that situation?

Mr. Courtney: If the Court please, I object to that, incompetent, calling for a conclusion.

The Court: I think that is afield. Sustained.

Q. How about the two areas, Mr. Damon, that

(Testimony of Sam R. Damon.)

involved in this law-suit and the area covered by the Waterhouse lease, which of the two are the superior grounds?

Mr. Courtney: Objected to, if the Court please, incompetent, calling for a conclusion of the witness.

The Court: Overruled.

Mr. Courtney: Invading the function of the jury.

Judge Robertson: We have been getting conclusions all the way through, Your Honor.

Mr. Courtney: I have never ceased to object.

Judge Robertson: I understand the objection is overruled?

The Court: Yes.

Q. You may answer the question.

A. In my opinion the soil covering on the two areas under condemnation are superior.

Q. Mr. Damon, do you know of the sale by the Trustees of the Damon Estate of a piece of land at Moanalua to the City and County of Honolulu?

A. I do, sir.

Q. What acreage has that lot, and what is it used for?

A. That would comprise three acres and was sold to the City and County of Honolulu for a school site, sir.

Q. Will you please mark that school site on this map, Exhibit "C". [410]

A. I will, sir.

Q. Mark that with an "S", which will stand for School. (Witness does so.)

(Testimony of Sam R. Damon.)

Q. You have now marked that school lot on Exhibit "C", have you? A. Yes sir.

Judge Robertson: We offer in evidence a Deed, Your Honor, covering that school lot. May it be marked as an Exhibit.

The Court: Defendant's Exhibit 1.

Mr. Courtney: If the Court please, the objection to that is that the evidence is incompetent, remote in point of time.

The Court: The objection is quite tardy. There was ample time after the offer, the Court heard nothing and received it in evidence upon the assumption that there was no objection.

Mr. Courtney: If the Court please, the Exhibit had not even been marked, it is just being marked now.

The Court: Many Exhibits are received in evidence and marked at a subsequent time.

Mr. Courtney: If the Court please, I respectfully ask the Court to consider the objection and rule upon it.

The Court: It would be too late to object after an instrument was received and marked.

Mr. Courtney: If Your Honor please, I would like to say that the Government respectfully request the Court to consider the objection. I was not aware the Court had ruled; I heard only the offer and when I tried to formulate the objection——

The Court: What is the basis of the objection?

(Testimony of Sam R. Damon.)

Mr. Courtney: The objection is to the evidence as incompetent; that is remote in point of time; that it does not affect the market value of this property; that it is of no probative value in determining the market value of this property because the market value of property is not measured in terms of the necessity of the public to acquire property for public purposes. I do not object to the Exhibit as not being the best evidence, but I do object to the evidence itself.

The Court: What is the time?

Judge Robertson: On the subject of remoteness, I call the Court's attention to the fact that this Deed is dated the 17th day of December, 1937, less than four years ago.

The Court: Objection overruled.

Judge Robertson (to the Jury): This Deed, gentlemen, is dated the 17th day of December, 1937, whereby the Trustees of the Damon Estate conveyed to the City and County of Honolulu three acres of land at Moanalua, Honolulu for the sum of $5250.00. In other words $1750.00 per acre. You may cross examine.

Cross Examination

Questions by Mr. Courtney:

Q. Mr. Damon, this so-called purchase of a school site, was it to serve the subdivisions which you had created? A. It was, sir.

Q. And to render school service to the children on your property, is that right?

(Testimony of Sam R. Damon.)

A. It was, sir.

Q. You spoke a moment ago of the Waterhouse properties, [412] under the terms of that lease isn't it a fact that the Waterhouse investment in buildings ultimately reverts to the Damon Estate on the expiration of the lease?

A. He has full right of removal of improvements at the end of the term.

Q. Isn't it true also that the other leaseholds on your other subdivisions are limited to a period of ten years? A. That is partially correct, sir.

Q. What relationship does Mr. Waterhouse have with you, either by blood or marriage?

A. He is my father-in-law, sir.

Mr. Courtney: I think that is all for the time being.

Redirect Examination

Questions by Judge Robertson:

Q. Mr. Damon, you have stated that this school that has been built there the children at Moanalua attend, is that a regular public school to which any admissible students are admitted?

A. It is under the same jurisdiction that all schools throughout the City and County and Territory of Hawaii are in, sir.

Q. It is an ordinary public school?

A. That is correct, sir.

Judge Robertson: That is all.

(Testimony of Sam R. Damon.)

Recross Examination

Questions by Mr. Courtney:

Q. One further question with reference to the time of this Deed, isn't it a fact that the Damon Estate financed the building of the roadways and the placing of utilities on the Waterhouse tract? [413]

A. We financed the roads, the Honolulu Gas Company went in at no expense to either party; the Hawaiian Electric went in at no expense to either party.

Q. The water?

A. The water was put in at our expense, sir.

Mr. Courtney: That is all.

Redirect Examination

Questions by Judge Robertson:

Q. And the tenants on the Waterhouse Subdivision pay the Damon Estate the regular water rates for the water supply?

A. No sir; Mr. Waterhouse pays for those.

Judge Robertson: That is all.

The Court: That is all.

Judge Robertson: Mr. Waterhouse will you take the stand, please.

JOHN WATERHOUSE

having been first duly sworn as a witness for the defense, testified as follows:

Direct Examination

Questions by Judge Robertson:

Q. Will you state your name, please.

A. John Waterhouse.

Q. You live in Honolulu? A. I do.

Q. Are you one of the Trustees under the Will of Samuel M. Damon? A. I am.

Q. Are you connected with the Bishop National Bank? [414]

A. I am President and Director of the Bishop National Bank.

Q. How long have you been President of the Bank?

A. Since Mr. Bottomley's death; I have forgotten how many years ago, seven or eight years anyway.

Q. Were you previously a director?

A. I was previously a director.

Q. For several years?

A. Yes, ever since its incorporation.

Q. Are you connected with the firm of Alexander & Baldwin, Limited?

A. I am its President and Manager.

Q. How long have you been such?

A. I have been with Alexander & Baldwin since 1901; I have been President and Manager since 1918, July 1918.

(Testimony of John Waterhouse.)

Q. Do you know what the interest rates obtainable on investments in this Territory are?

A. I do.

Q. As of November, 1940 what was the earning power of money invested in reasonably safe securities? A. Under 4%.

Mr. Courtney: We object to this for the same reason recited in reference to the testimony of Mr. Henderson, on the grounds that it is incompetent and immaterial. The only issues of the earning power would be directed to the question of unimproved real estate with which we are dealing. On that issue I have no objection to the testimony, but certainly the earning power of money invested in various classes of securities, those limited to Trust Companies and those eligible for banking investment are not material in a case of this kind.

[415]

Judge Robertson: I think Your Honor has passed on the same objection in a question put to Mr. Henderson and Your Honor overruled the objection. If Your Honor desires any authority on the subject I can supply it.

The Court: Overruled.

Witness: Not over 4%, under.

Judge Robertson: You may cross-examine.

Cross Examination

Questions by Mr. Courtney:

Q. Mr. Waterhouse, what is the rate of interest on unimproved real estate?

(Testimony of John Waterhouse.)

A. That I don't know because the National Bank if not allowed to loan on any unimproved real estate.

Q. Well now, as a banker, on the basis of your experience, what would you consider to be a fair and reasonable rate of return on a loan on unimproved real estate located in the vicinity of this real estate for development, considering the hazards?

A. It would depend on the man who wanted the loan.

Q. Assuming that the property itself were the only security?

A. As I say, we cannot loan, being a National Bank, on unimproved property, therefore, I have never had any reason to go into that, but it should be the normal earning, it should be the normal earnings interest rate.

Q. I don't quite understand you.

A. The normal earnings interest rate.

Q. What would you consider normal earnings interest rate?

A. The Bank itself during the last year and a half, even at the time of November, 1940, was not earning over 3-3/4%. [416]

Q. Do you mean to say that you would consider it a prudent investment, as a banker, to put $309,000 or $358,000 out on this real estate at a 3% yield, considering the hazards?

A. I don't think there is very much of a hazard.

Q. You would loan 3%?

(Testimony of John Waterhouse.)

A. I didn't say that; the Bank could not loan the money on unimproved property.

Q. Isn't it true that the rate of interest increases with the rate of the hazard?

A. It certainly should.

Mr. Courtney: I think that is all.

Redirect Examination

Questions by Judge Robertson:

Q. Let me ask you, Mr. Waterhouse, does the Bank loan money on improved real estate?

A. It does.

Q. What rate of interest is ordinarily payable on a mortgage on improved real estate?

A. 5%.

Q. When you have stated that the earning power of money in reasonably safe securities does not exceed 4%, did you include the possibility of getting some 5% real estate mortgages? A. I did.

Q. When you say not in excess of 4%, what have you in mind?

A. What the average earning of the Bank is with which I am associated, which loans money on all sorts of ventures, what its average rate of return is and which is 3¾%.

Q. Can you give us some idea of the quantity of available [417] real estate mortgages at 5% under present conditions?

A. They are very few and far between.

Q. When you have referred to the experience of your bank, would you say that the experience of

(Testimony of John Waterhouse.)

your bank is any different to the common experience in this community in the matter of investments?

A. I don't think so; we loan on our agency accounts to plantations and ranches at 3%.

Q. That is Alexander & Baldwin?

A. That is Alexander & Baldwin, not the Bank.

Judge Robertson: That is all.

Recross Examination

Questions by Mr. Courtney:

Q. Mr. Waterhouse, when you speak of the 5% rate, on what proportion of the full and true value is that calculated?

A. Must be 60% of the full value.

Q. 60% of the full and true value?

A. Yes sir.

Q. Do you know what the rate is on contracts for purchase? A. What?

Q. Purchase contracts of real estate, what we call purchase for deed? A. No I don't.

Q. Of course, likewise that 60% of the full and true value takes into account the purchaser himself, or the mortgagee?

A. Any banker will place a lot of emphasis on the man that is borrowing. [418]

Mr. Courtney: That is all.

Judge Robertson: That is all. Thank you. Mr. Russell will you take the stand please.

JOHN E. RUSSELL

being first duly sworn as a witness for the defense, testified as follows:

Direct Examination

Questions by Judge Robertson:

Q. State your name.

A. John E. Russell.

Q. You live in Honolulu? A. I do.

Q. Are you one of the Trustees under the Will of the late Samuel M. Damon? A. I am.

Q. Are you connected with the Bishop National Bank? A. Yes.

Q. In what capacity? A. A director.

Q. Are you connected with the Hawaiian Trust Company? A. Yes.

Q. In what capacity? A. Director.

Q. Are you connected with the firm of Theo H. Davies & Company, Limited? A. Yes.

Q. In what capacity?

A. President and Manager.

Q. Subject to the lease to the Honolulu Plantation Company, which has been referred to in the evidence here, [419] are the Trustees of the Damon Estate the owners of the fee simple of the lands involved in this case? A. They are.

Mr. Courtney: I didn't understand that that is in dispute.

Judge Robertson: Neither do I, but your predecessors in operation here have generally required some statement of ownership in condemnation cases. I was just complying with that practice.

(Testimony of John E. Russell.)

Q. Show you a document and ask you Mr. Russell, if this is the lease between the Trustees of the Damon Estate and the Honolulu Plantation Company which has been referred to in this case?

A. It is.

Judge Robertson: We offer this in evidence and ask that it be marked as an Exhibit.

Mr. Courtney: No objection.

The Court: Received as Defendant's Exhibit 2.

(Thereupon the document above referred to was received in evidence and by the Clerk marked Defendant's Exhibit 2.)

Judge Robertson: I will not take up the time of the jury to read this lease in its entirety unless some juror asks me to do so. This lease is dated the 27th day of June, 1927, between the Trustees of the Damon Estate and the Honolulu Plantation Company, a California Corporation, leasing certain lands at Moanalua, Honolulu, by detailed description. The lease goes on to say the total area is 1,451.66 acres of which 1,223.91 acres are, or are deemed to be cane land. The lease is for a term of fifteen years beginning January 1, 1929, at an annual rental of $28,687., payable quarterly. That figures out at the rate of $23.50 [420] per acre. Then there is a provision that if it should be found at any time during the term of this lease that the lessee has planted in cane a larger area of the demised properties than the area of 1223.91 acres, which it represents as cane land, the lessee shall pay to the lessors additional

(Testimony of John E. Russell.)

rent for such cane land in excess of 1223.91 acres at the rate of $18.50 per acre. That is for the area that was classed as not cane land in this lease.

Q. Have you been familiar, Mr. Russell, as a Trustee of this estate, with the areas of land at Moanalua involved in this litigation?

A. Yes.

Q. Were you sufficiently familiar with those lands to form an opinion as to their value?

A. Yes.

Q. As of November, 1940, what, in your opinion, was the value of that area that has been called the gore lot?

Mr. Courtney: Objected to as incompetent, without a foundation.

Judge Robertson: I ask counsel to state what he means by 'without foundation'.

Mr. Courtney: Just what the word implies; the witness hasn't shown any familiarity with land values in this community.

Judge Robertson: I am not calling this witness as an expert realtor, but as an owner. The law, as I understand it, is that the owner of land sought to be condemned in a condemnation case is a competent witness as to the value of his own land. That doesn't depend upon knowledge acquired as a dealer in real estate, that is the right any owner has inherently in himself. If your [421] Honor desires authority I will be glad to furnish it.

The Court: Overruled.

(Testimony of John E. Russell.)

Q. You may answer the question.

A. $119,352.24.

Q. That is for the 61-plus acres in that area?

A. 61.512, sir.

Q. On what do you base that opinion, Mr. Russell?

A. Because that sum of money represents a capitalization of the earnings at 4%.

Mr. Courtney: Are you finished?

Witness: Yes. That is all.

Mr. Courtney: Had you finished your answer; I don't want to interrupt you.

Witness: Yes, I am finished.

Mr. Courtney: I move to strike the evidence upon the grounds previously stated with respect to the capitalization and with respect to the income of property which property has no established income or of any use heretofore made of the property, or by reference to any other property of a similar character. The fair market value is not determined and cannot be determined by the capitalized return on the property, I, therefore, move to strike the testimony.

The Court: Overruled.

Q. In capitalizing rental value, Mr. Russell, do you have reference to the rent under the Plantation lease or some other reference?

A. No sir, I have reference to the plan which the Trustees of the Damon Estate had worked out several years before this for the use of that land,

(Testimony of John E. Russell.)

and particularly I had reference to the immediate need for the development [422] which the Trustees had in mind on that area.

Mr. Courtney: We renew the objection and our motion to strike, on the further and additional ground that the plans, whatever they may be, or the intentions, whatever they may be, of the owner are not material.

Judge Robertson: They certainly are, on the best and most profitable use of what the land is capable of or adapted to.

The Court: Overruled.

Mr. Courtney: And I want to add that objection also to any evidence which is based, in whole or in part, on a contemplated use of the lands in question with lands of the same owner, it is not material and is not competent in proving market value, so I would like to have the objection run to both and the ruling apply to both.

Judge Robertson: We are willing to allow counsel to have a standing objection to each and every one of my questions.

Mr. Courtney: That wouldn't be necessary unless I am concerned about their competency and materiality, and I think counsel will do me the slight honor to allow me to represent the United States as well as I am equipped to do it, and I say that in all humility. I profess no great mental acumen or legal acumen, and I have, of course, not the years of legal training of my learned colleague, but in

(Testimony of John E. Russell.)

my simple way I am trying to preserve the record. I am sure if counsel will allow me to do that it will serve to facilitate this trial.

Judge Robertson: It is agreeable to me. I only made the suggestion with reference to the saving of time.

The Court: Yes, and there was a motion to strike.

[423]

Judge Robertson: Was the motion denied?

The Court: The motion was denied.

Q. You have referred to certain plans that the Trustees had in mind, did they have any reference to the proposal to obtain from the Honolulu Plantation Company the surrender of that gore lot from this lease? A. It had.

Q. When was that arrangement made?

A. To the best of my knowledge in July of last year, 1940. The release was to be effective of the whole lot in April, 1941.

Q. That is the surrender of that area from the lease would be in April, 1941?

A. I believe a certain amount was to be available to us last Fall if we had asked for it.

Q. When you mention April, 1941, that would mean the rest of that area?

A. The rest of the whole area.

Q. Are you familiar with the experience of the Damon Trustees in connection with previous subdivisions made by them at Moanalua? A. I am.

Q. Did the experience of the Damon Estate with

(Testimony of John E. Russell.)

those previous subdivisions have anything to do with the idea of the Damon Trustees in doing something more with this gore lot?

A. That is a little difficult to answer. It did, yes.

Q. Do you mind explaining that?

A. Yes. The Damon Estate Trustees are charged with making the best possible use of the land they have in their charge. There is a large area occupied by Honolulu [424] Plantation and otherwise unoccupied that belongs to the Estate and we planned a long time ago on its proper development. It is rather like, if I may digress a minute, as if you owned a large amount of oil land. You might elect to put your wells here and here and here, and exploit that land in an orderly manner and not put wells all over the place and rush your oil to market, and that is what the Damon Estate did; they have planned their development far ahead. We started with the Shibata lease, which is on the mauka side of Puuloa Road; we then went to Kaloaloa "A", which is on the makai side of the road, and just mauka of the Airport; we then went to Kaloaloa "B"; and by that time the demand for land had become so great that we were no longer dealing in small agricultural lot, but we were dealing in small house lots. The gore had always been in our mind as a place to develop for theatre site, garage, stores and home sites. It would have come under normal conditions, that probably would have come fifth or

(Testimony of John E. Russell.)

sixth on our list of development, but the tremendous amount of development work going on at Hickam and Pearl Harbor upset that schedule and forced us to reconsider. In other words, the plan for that lot has become number four on our list.

Q. In your opinion could that gore lot in November, 1940, have been properly regarded as an area of mere sugar cane land? A. No sir.

Q. In your opinion, taking into consideration the experience of the Damon Estate and any other elements that you deem proper, what, in your opinion, was the best and most profitable use that that gore lot was adapted to in [425] November, 1940?

A. As I said before it could have been used and would have been used for the establishment of a retail center with a large theatre, garage, automobile salesroom, all that sort of thing, and behind that for approximately quarter-acre homesites.

Q. As of November, 1940, how long had those demands for such a subdivision been going on at Moanalua?

A. With particular reference to the urgent demand for the use of the gore lot, it had been going on for one year and a half. That is picking it out of the air, but I think I am substantially right in saying that.

Q. When you gave your opinion as to the value of the gore lot at $119,352.00, you have made reference to capitalization at the rate of 4%, by that do you mean that capitalizing the rent that would be

(Testimony of John E. Russell.)

derivable from the gore lot at 4% you reached the value expressed here as representing the value of the fee of the land? A. No sir.

Q. No?

A. No, I reached that by a rather complicated figuring. We took the cost, and I might say it is a fairly well known cost from our past experience, of developing that land, putting in the developments required. We have charged interest on that; we have charged depreciation on those costs, and the figure I have given you represents the capitalization of the net income after those have been deducted.

Q. In adopting the 4% rate of capitalization would that, in your opinion, be a proper rate to use?

[426]

Mr. Courtney: Objected to as incompetent whether or not it is a proper rate.

The Court: Overruled.

A. Yes sir.

Q. Will you state your reasons for that, Mr. Russell?

A. Because I know money, large sums of money in this town which are looking for 4% investment and cannot get them and are taking lesser rates, and furthermore, I consider that anybody who bought that land, or who used that land so as to obtain a net 4% interest would also have a wonderful investment because the land is certain to increase in value there. It is roughly 4-1/2 cents a square foot, so he gets his 4% interest and gets the accretion in the value of the land.

(Testimony of John E. Russell.)

Q. In other words, this willing buyer we have been talking about would not only get a safe 4% investment, but having become the owner of the fee of the land would come into the unearned increment?

Mr. Courtney: Objected to as irrelevant, incompetent, calling for a conclusion, leading and suggestive.

The Court: Overruled.

Q. State whether or not the activities at Hickam Field and the Navy Yard are connected with this demand you say existed for small lots at Moanalua?

A. It is, particularly with reference to the gore lot.

Q. In your judgment does the well known increase in the population of Honolulu in recent years have any connection with the demand that you say existed? A. Yes.

Q. You have been making special reference in your answers, Mr. Russell, to the gore lot involved in this same case. [427] No. 436 is an area of 192 acres, makai of the highway, what have you to say as to that area being considered as mere cane land in November, 1940?

A. It should not have been.

Q. Why not?

A. Because it was only being used as cane land because it was under lease, for one reason, to the Honolulu Plantation, and because the trustees had planned for the development of that land as house

(Testimony of John E. Russell.)

lots at a later date in keeping to their schedule of making the best use of the land on the makai side of the road.

Q. What, in your opinion, was the value of that 192-acre area?

A. On the same basis as I have just described for the gore lot it was $216,134.75 as of November, 1940.

Q. What was the highest, best and most profitable use that that area could be put to in the reasonably near future?

A. Cutting that land into house lots which would probably be somewhat less than five to the acre, 4.6 to the acre.

Q. In reaching that valuation, do you reach it by the 4% capitalization rate applied to the net rental that would be derivable?

A. The net income from rentals after deducting service charges on the improvements, yes sir.

Q. Prior to November, 1940, had the Trustees of the Damon Estate negotiated a lease with the Bishop National Bank? A. Yes.

Q. I will show you a lease dated September 12, 1940, between the Trustees of the Damon Estate and the Bishop [428] National Bank, and ask you if this is the lease that you have reference to?

A. It is.

Judge Robertson: We offer this in evidence and ask that it be marked as an Exhibit.

Mr. Courtney: Objected to as incompetent, im-

(Testimony of John E. Russell.)

material to any issue before the Court and the jury. There is no evidence of market value or, indeed, of a fair transaction between disinterested parties based upon the evidence which is here before the Court.

The Court: What land is that?

Judge Robertson: This, Your Honor, is a lease of a piece of land designated as a portion of Lot "C" situated at Moanalua, containing an area of 2.2149 acres as shown on a plan attached to the lease.

The Court: Where would that be on that map, Exhibit "C"?

Judge Robertson: It appears on the map, Your Honor. It appears on the map that is under this one (referring to Government's Exhibit "A"), this is Lot C-2 and is shown on Government's Exhibit "A" and referred to in the petition in the case.

The Court: What is its position, its location with reference to the land that is under condemnation?

Judge Robertson: It is within the condemned area.

Witness: May I help? It is at the corner where Hickam Field adjoins the Pearl Harbor Road on the makai side; it is right in the corner there.

Mr. Courtney: Lot C-1.

Witness: Lot C-1 on the map.

The Court: It abuts then on the land involved in 434? [429]

(Testimony of John E. Russell.)

Mr. Courtney: It is a part of the land.

The Court: The objection is overruled.

Q. I notice, Mr. Russell, that this lease, although dated September 12, 1940, was for a term of thirty years beginning the 1st of July, 1940. That would indicate that the lease was negotiated before it was dated, is that correct?

A. Yes, it was a very long negotiation there between the authorities at Hickam Field and Honolulu Plantation; was entered into informally, I believe, before formally signed up.

Judge Robertson (To the Jury): This, gentlemen, is a lease from the Trustees of the Damon Estate to the Bishop National Bank dated September 12, 1940, of a portion of Lot "C" at Moanalua containing 2.249 acres, for a term of thirty years beginning the 1st day of July, 1940, the annual rental being $225.00 payable in semi-annual instalments.

The Court: Did you say that that was a part of the land condemned?

Judge Robertson: Yes, Your Honor.

The Court: I understood the witness to say that.

Witness: Yes, it is part of the land that has since been condemned. I am a little hazy as to the ownership. I think the Bank holds the title to the building to which it has no lease to the land today.

Judge Robertson: The land covered by this lease is not the land on which the Bank building now stands which we saw the other day.

(Testimony of John E. Russell.)

Witness: It is a part of the other piece. I don't know the numbers that you are using, but this is Lot C-1, which I understand is part of the 77-acre piece, which [430] has been condemned.

Judge Robertson: Here is a map attached to the petition in 434, Your Honor, showing Lot C-1, as part of the 77-acre tract.

The Court: Part of the land condemned?

Judge Robertson: Yes.

The Court: Under lease to the Bishop National Bank, are they made a party to this suit?

Judge Robertson: I don't know if they were joined; if they were they went out again. I wanted to show the Court that the diagram of the demised areas attached to the lease corresponds with the diagram attached to the petition in Case 434.

The Court: The land as pointed out to the jury as a parking lot?

Mr. Courtney: Yes, Your Honor. The land that is subject to this leasehold is Lot C-1, it is used or was being used for a parking lot. The Bishop National Bank, which the jury viewed and which the Court viewed, is not on the property condemned in Civil 434, but this Lot C-1, which is the subject of the leasehold is directly over the boundary, as I would call it, and the leases of which the witness spoke were negotiated, one with the Army for the entrance to Hickam Field; later this lease was negotiated for the parking facilities. Secondly, the

(Testimony of John E. Russell.)

Bishop National Bank, which the Court inquired about, is a party to this suit.

The Court: Have they responded here? I haven't heard of them before. The Honolulu Plantation came in and explained that they had reached an agreement for settlement of their interests in the matter. [431]

Mr. Courtney: I think the absence of the Bishop National Bank may be explained this way: The Bishop National Bank didn't have any fixtures or improvements on Lot C-1, merely an open area, their interest being in what would be the fee value of the property, and also because of other provisions in their lease.

The Court: They were named as a party-defendant?

Mr. Courtney: Named as a party-defendant and answered.

The Court: All right, but they had no interest that the jury is to concern itself with?

Mr. Courtney: Not separately, no.

Q. (By Judge Robertson): The next area, Mr. Russell, is the 77 and a fraction acres involved in Case No. 434, you are familiar with that area, are you? A. Yes sir.

Q. What, in your opinion, was the value of that area as of November, 1940? A. $170,279.17.

Q. $170,279.17? A. Yes.

Q. What is the basis of that opinion?

A. Just the same as in the previous case, the

(Testimony of John E. Russell.)

capitalization of the net income, anticipated net income of 4%.

Q. Do the factors you have heretofore mentioned with reference to the previous experience of the Damon Estate and the development at Hickam Field and the Navy Yard and the increasing population of Honolulu contributing to the existing demands for such lots, did those same reasons enter into your opinion as to the value of this 77-acre area? [432] A. They do.

Q. In other words, those general reasons, as I understand you, apply to the whole 331 acre area involved here?

A. They do. I want to emphasize again the gore lot as in a different category. There was a double reason,—the Navy people themselves wanted to develop——

Mr. Courtney: I object to that, calling for hearsay.

Witness: I beg your pardon——

Mr. Courtney: Let the Court rule, Mr. Russell, we will get along much better that way. Objected to and move to strike the testimony with reference to the Navy Department as hearsay.

Judge Robertson: I don't know what counsel means by hearsay, Your Honor.

The Court: It isn't clear to me in that connection. The motion to strike is denied, the objection overruled.

(Testimony of John E. Russell.)

Q. Of the three areas referred to here, the 77-acre piece, the 192-acre piece, and the gore lot, which, in your opinion, in your judgment, as of November, 1940, had the superior value?

A. If you draw a distinction between the three I think the 77-acre piece would have yielded great net revenue to a buyer than any of the others.

The Court: You mean upon the whole or by the acre?

Witness: As a whole and per acre. The acre value we would have reached there would have been, the acre value would be $2,203.18 on that piece and it would have been 1940 odd dollars on the gore lot.

Q. Notwithstanding the special reasons for the early subdivision of the gore lot you consider that the 77-acre [433] tract is possibly superior to the gore lot in value?

A. The figures we made up show that it would have yielded a better return, a greater return.

Juror: May I ask the witness a question?

The Court: Yes.

Juror: Mr. Russell, is that partially due to the fact that in developing the gore lot the buyer would have expenses for roads, etc., which he would not have in the 77-acre area?

Witness: He would have had greater expenses on the gore lot per acre of usable land than he would on the other lot.

Juror: Does that account for the difference?

(Testimony of John E. Russell.)

Witness: That accounts for the difference.

Juror: Thank you.

Q. (By Judge Robertson): Mr. Russell, are you able to state the amount of rentals received by the Damon Estate from and out of these prior subdivisions?

A. Yes, I have a memorandum here which has those figures on it.

Q. Well, the first area to be subdivided in 1924 the area was 9.533 acres, what rentals do the Damon Trustees get from that subdivision?

Mr. Courtney: Objected to as incompetent, if Your Honor please, there is no showing of comparable values of that area and any area here in question; there are many elements and factors which must be considered.

The Court: Let me have that question, please.

(Thereupon the Reporter read the question as above recorded.) [434]

The Court: I think that is rather remote, Judge. The location is far away from the land in question.

Judge Robertson: May I correct that statement; these subdivisions are not far away from the land being condemned, they are in the immediate vicinity as shown on this map.

The Court: The land was opened in 1924, was it not?

Judge Robertson: Yes, Your Honor, shown on this map here, Exhibit "C", all the distance from

(Testimony of John E. Russell.)

here to here (indicating an area on Government's Exhibit "C"), as it appears here, all in Moanalua section and in the immediate vicinity of these lands.

The Court: Is it your intention to offer to show the rental on each of these different subdivisions?

Judge Robertson: I had hoped to show to the Court and jury the net rentals derived from the different subdivisions. The Waterhouse subdivision is already in.

The Court: I believe that is admissible. Overruled.

Mr. Courtney: May my objection run to all this proposed testimony?

Judge Robertson: I agree to that, Your Honor.

Q. You may answer that, Mr. Russell.

A. You want to know the rental obtained, the net rental obtained by the Damon Estate from the Shibata lease, the 9.533 acres leased in 1924?

Q. The 1924 subdivision, sometimes called the Shibata Subdivision?

A. My figures,—I know the value capitalized at 4% of the net income—I have not that with me. The net income after water has been deducted, water revenues have been [435] deducted,—I have the value capitalized at 4% after all other earnings than land rentals have been deducted, if you want that value on the Shibata lease.

Q. We are not dealing here with the subject of water rentals, Mr. Russell.

(Testimony of John E. Russell.)

A. I am merely saying that my figures are complicated by the inclusion of the water income, which is a very large one. The only value per acre of the Shibata lease, the capitalization works out at $3,330.14 an acre, or a total valuation of $31,746.25.

Q. This $3,330.14 does that represent the net rental received by the Damon Estate per acre for that area?

A. No it doesn't, Judge. I have not before me the corrected net rental per acre on that area. I have with me the capitalization of that at 4%, which is $3,330.14 per acre.

The Court: Judge Robertson, we will pause for a recess at this time.

(Recess: 9:15-9:30 o'clock a. m.)

Continuation of Direct Examination of Mr. Russell.

Questions by Judge Robertson:

Mr. Russell, you have just informed me that you wanted to correct one of the figures you have given here as to valuation, what is that?

A. It is the figure of the gore lot, the total value I wish to correct.

Q. What correction do you wish to make?

A. I gave you a figure of $119,352.24, I wanted that to be $127,931.25.

(Testimony of John E. Russell:)

Q. In your opinion that figure as now corrected is based [436] on the reasons already stated?

A. Yes sir.

Q. With reference to the rentals, the net rentals derived by the Trustees from the 1924 subdivision, which contains upwards of nine acres, have you the net rental per acre to the Estate from that now?

The Court: Judge Robertson, before you take that up, there is another matter here. I may have misunderstood the witness, but I understood him to say that the 77-acre lot would yield the highest income, both as to acreage and as to total income. The figures that I have here taken from the witness' statement does not bear that out. The 192-acre lot, or larger one, part of 436, has the largest figure of valuation. I would like to have you check that with the witness again.

Judge Robertson: Evidently a little arithmetic applied would answer your question, Your Honor. Divide 216,134 by 192 and then by dividing 170,279 by 77 that would give the comparison.

The Court: No; that would give it by the acre, but as to the total value the witness at one time stated, by my notes, that the 77-acre lot was the more valuable.

Judge Robertson: I so understood the witness.

The Court: That is the thing I want straightened out.

Judge Robertson: Mr. Russell, will you give some consideration to the points raised by His Honor.

(Testimony of John E. Russell.)

Witness: The 77-acre piece has a total value of $170,279.17, which works out at $2,203.18 per acre. The other piece, the 192.956-acre piece, has a total value of $216,134.75, which works out at $1,120.12 per acre as of [437] November, 1940 in both cases.

The Court: Then you didn't mean to give the idea that the 77-acre lot was more valuable than the 192-acre lot?

Witness: No sir, I meant by acre it has a greater value.

Judge Robertson: I think the last question is not answered. Please read the question.

(Thereupon the Reporter read the question as above recorded.)

A. $133.20.

Q. We next have the subdivision at Kaloaloa, made in 1929, what was the net rent per acre of that subdivision to the Damon Estate?

A. $42.26 per acre.

Q. We next have the other Kaloaloa subdivision, made in 1933, what was the net rental to the Damon Estate for that area per acre?

A. $63.88 per acre.

Judge Robertson: The rental of the Waterhouse area is already in evidence.

Q. State whether or not a willing buyer in November, 1940 would have taken into consideration in determining the value of that property the various elements that you yourself have referred to in your testimony?

(Testimony of John E. Russell.)

Mr. Courtney: That is objected to as a conclusion; too indefinite.

Judge Robertson: Of course, it is a conclusion, all of the evidence with regard to valuations are conclusions.

Mr. Courtney: He is asked to express an opinion as [438] to what a willing buyer would have taken into consideration on the things he took into consideration, whatever they may be.

The Court: I think that is a little too broad and far reaching. Sustained.

Judge Robertson: We offer to prove by this witness that in his opinion a willing buyer, in determining the value of these areas in 1940, would naturally have taken into consideration all elements bearing on value with reference to the highest and best use that the property was adapted to,—would have taken all that into consideration.

Mr. Courtney: If the Court please, the offer is not the same as the question.

Judge Robertson: I take it that the offer is not objected to, is that correct?

Mr. Courtney: The offer is not objected to.

Q. Mr. Russell, will you state whether, in your opinion, a willing buyer in November, 1940, in determining the value of this land, having in mind the best and most profitable use to which it was adapted, had taken into consideration the several factors that you yourself have mentioned here this morning in your testimony?

(Testimony of John E. Russell.)

Mr. Courtney: Same objection, if the Court please, it is not a proper conclusion for this witness to draw; that is the province of the jury, for them to determine.

Judge Robertson: If Your Honor please, this newly framed question of mine is in accordance with the offer which was not objected to.

The Court: The objection is sustained. [439]

Judge Robertson: I make a new offer of proof. I offer to prove by this witness that his answer to the question just put and objected to would be in the affirmative.

Mr. Courtney: Same objection to the offer.

The Court: Offer denied.

Q. Mr. Russell, the other day during the trial of this case, Mr. Courtney intimated, when another witness was on the stand, that a proposition had been made to the Trustees of the Damon Estate to proceed with the erection of housing facilities, buildings, on the areas involved in these cases, and that the Damon Estate reached, or turned down, I think he put it, that proposition, is that correct?

Mr. Courtney: If the Court please, I object to that on the ground it is an assumption of a state of facts not shown in the evidence, nor is a correct statement of the question that was put to the witness. It wasn't limited to the Damon Estate.

Judge Robertson: Even if it wasn't limited to the Damon Estate I submit that I am entitled to prove that the statement is not correct as applied to the

(Testimony of John E. Russell.)

Trustees of the Damon Estate. Counsel threw that in here, and I submit, in fairness, we are entitled to meet it even if there is no actual testimony on the point. The statement of counsel was made here in open court in the presence of the jury and I would like to question this witness on that point.

The Court: Overruled.

Q. You may answer the question, Mr. Russell.

A. With particular reference to the gore lot, and to [440] no other piece, the Damon Estate were very seriously considering going into a very large building project of their own. We had been approached by people representing the Navy, and the matter was still very much alive when the condemnation proceeding killed it. The Trustees were extremely intrested and were, in my opinion, prepared to go ahead.

Mr. Courtney: If the Court please, I take it that my former objection with reference to plans and what not of the Trustees applies likewise to this testimony.

The Court: You may have an exception.

Q. Had the Army and Navy authorities discussed that proposition with the Trustees?

A. One of them discussed it with me. I don't know who discussed it with any other trustee. I know an officer of the United States Navy discussed it seriously with me.

Q. At any time prior to the filing of these condemnation cases had the Damon Estate reached or turned down that idea?

(Testimony of John E. Russell.)

A. No Sir, not to my knowledge.

Q. I think you have stated that the Damon Trustees still had that proposition under discussion when these condemnations were filed?

A. It was still an open matter.

Judge Robertson: You may cross-examine.

Cross Examination

Questions by Mr. Courtney:

Q. Mr. Russell, let us proceed backward, when did these discussions take place to which you have just referred in your testimony, what year the first of them?

A. I wouldn't want to be held to that answer, but I [441] think it was late 1939 or early 1940.

Q. Wasn't it 1937?

A. No Sir; it was late 1939 or early 1939, I am satisfied as to that.

Q. Wasn't it the year 1937? A. It was not.

Q. You are sure it was not 1938?

A. It was not.

Q. It might have been 1939?

A. It might have been in the month of December, 1939, might have been.

Q. Might not have been before?

A. No Sir, might not.

Q. So at the time you formulated this plan of subdivision in July, this arrangement with the Honolulu Plantation, you knew the Navy would be interested in this property?

(Testimony of John E. Russell.)

A. I know they were not interested in the property, they were interested in our development of the property.

Q. Wasn't your particular attention directed to the gore lot? A. Yes Sir.

Q. So that in July, these condemnation proceedings were filed in November, 1940, in July, 1940, you knew the Navy was interested in this gore lot, did you not?

A. I did not know that the Navy was interested in condemning the gore lot; I knew they were interested in having the Damon Estate erect a series of low costs to relieve the housing shortage at Pearl Harbor.

Q. For Naval personnel?

A. For Naval personnel. Not necessarily Naval personnel, I think they also had in mind Warrant Officers. [442]

Q. And the same situation was true with reference to the land on the makai side of the road?

A. No Sir, it was not.

Q. Did you hear anything about that?

A. I had nothing to do with that with anybody in the Navy, nor did I hear of anybody in the Navy putting anything on that land at that time; there were general rumors that land was going to be taken.

Q. You heard rumors that this land was going to be taken? A. No Sir.

(Testimony of John E. Russell.)

Q. You knew from the rumors that were in the air?

A. I heard lots of rumors, I paid no attention.

Q. Let's go back a little bit, Mr. Russell, let's take the first of the Damon subdivisions which was established in 1924? A. Yes.

Q. How many lots were in that subdivision, and how many years did it take to sell those lots?

A. I can't tell you—there were fourteen lots, but I can't tell you how many years it took.

Q. As a matter of fact it took five years, did it not? A. I doubt that very much.

Q. How many years did it take?

A. I don't know.

Q. Is there anyone in your organization that would know? A. The books would show.

Q. Would you make reference to the books and give me that information?

A. Yes. How many lots——

Q. How many lots there were, and I want to know how many [443] years it was before they were all sold. A. There were 14 lots.

Q. I want to know the facts, Mr. Russell?

A. I can give you some facts; I don't know whether you want them or not.

Q. I want to know the number of lots, which you have given me, and the number of years it took to sell them.

A. I can get that, I haven't it available here.

(Testimony of John E. Russell.)

Q. With reference to the subdivision established in 1929, how many lots were in that subdivision?

A. I don't know, but I can find out.

Q. You don't know?

A. I haven't that information with me.

Q. You don't know the number of lots in that subdivision nor the number of years it took to sell them?

A. I can get both in a few minutes if you would like to have them. We can count them off on the map. May I ask Mr. Damon to count them on the map?

Q. How long will it take you to get the information as to the number of lots and the number of years required to dispose of the lots—the number of years it took to sell those lots?

A. I can have it by tomorrow.

Q. Will you undertake to do that with reference to the four subdivisions, the 1924, 1929, 1933 and 1938 subdivisions?

A. Yes. I don't want to throw any information and be put out of order, but I can tell you this, we are turning away applications at the rate of 250 a year without having put a single ad. in the paper or employing a real estate broker.

Q. Tell us how many years it took to sell those lots and [444] we will be satisfied.

A. I will try.

Q. This valuation you have made on the basis

(Testimony of John E. Russell.)

of capitalization at 4%, when did you compute those figures, what day? A. Last week.

Q. Was that after this case was called and the jury sworn?

A. No, the compilations as to cost were made last year.

Q. When did you put together the calculations you have given from the witness stand here?

A. You mean net rental at 4%?

Q. Yes.

A. Thursday, Friday and Saturday of last week.

Q. Thursday, Friday and Saturday of last week, that was after this case was called?

A. I capitalized the net rental after the case was called for trial.

Q. Just tell me when you did it?

A. Thursday, Saturday and Friday, and some this morning.

Q. And all of the information that you had was equally in the possession of the other trustees, was it not?

A. It was available to them, Yes; I think they elected me to get it out.

Q. You were selected to be the one to present it?

A. Yes; it is all in the books.

Q. Now this calculation which you have made at 4% is based upon some plan that you had, isn't that right, which contemplated the use of this property in connection with the other Moanalua holdings of the Damon Estate, isn't that right?

A. Yes.

(Testimony of John E. Russell.)

Q. In arriving then at the rentals which you calculated [445] could be received from this property you had in mind that there would be no competition from the other property of the Damon Estate, isn't that right?

A. Not entirely right; we had in mind putting on the gore lot and another area at the same time.

Q. What other area?

A. A small piece at the Honolulu end.

Q. A small piece on the Honolulu side?

A. Yes.

Q. That was adjoining the subdivision you had previously made as shown on Exhibit "C"?

A. As I explained this morning, a long distance plan, which was not worked out last year but a long time ago, was for the development of those lots towards Pearl Harbor in an orderly way, on the makai side of the road, before we took the mauka side the makai side being the more desirable and easiest to dispose of.

Q. So this calculation you have made is the result of some long range plan which contemplated the use of all of the Damon property, isn't that right, developing those which you considered the most desirable at the time?

A. It was based on a recognition some ten years ago that we were no longer dealing with cane land.

Q. Just answer my question,—I think you understand it,—I know you,—you had in mind the gradual release of these lands, did you not?

(Testimony of John E. Russell.)

A. Yes sir.

Q. And the valuations which you have given here are based upon the assumption that there would be no competition from any of your other lands?

[446]

A. That is correct.

Q. And it is only in that way, by preventing competition, that you could have obtained the rentals upon which your calculations are based?

A. That is correct.

Q. That is right?

A. That is true, that is an elemental rule of business too.

Q. Now the market which you contemplated for the sale of these lots was the personnel, civilian and warrant officers and what not, who were employed in either of the two Government reservations, Hickam or Pearl Harbor?

A. No sir, that is not correct; that is true with respect to the gore lot; that is not true with respect to the other land.

Q. That is true with respect to the land which immediately adjoins your last subdivision, is it not?

A. It is not true; that was the natural growth of the City of Honolulu that was going on before this great development started at Pearl Harbor.

Q. What is the market for the land?

A. The demand is from people in Honolulu who want to get into the suburbs.

(Testimony of John E. Russell.)

Q. As a matter of fact if there is a demand in the City of Honolulu for people moving out, wouldn't the natural tendency be to get as close to the City of Honolulu as they could?

A. That is right.

Q. So the lands which lie in the natural line of development are those closer to Honolulu than those approximate to [447] Pearl Harbor?

A. That is what the Trustees decided years ago.

Q. That is what you decided years ago?

A. Yes.

Q. And there are some 500 acres of land on the mauka side of the road? A. Oh yes.

Q. And perhaps even more which would be suitable? A. A great deal more.

Q. For any kind of development?

A. Well no, there are some 500 acres of excellent——

Q. Of cane land?

A. Excellent cane land. There is a lot more of shale or hard mud——

Q. Which would be suitable for development for the expanding population of Honolulu?

A. I believe it will in the course of time.

Q. Just as soon as the demand catches up with the supply?

A. When the demand catches up with the supply I believe that is what will happen. It is our duty——

Q. Let's not worry about your duty, there is trouble enough without having the jury to pass on

(Testimony of John E. Russell.)

that. Now, let's take these valuations which you have given, Mr. Russell—let's take the gore lot,—just how did you arrive at the rental value of that lot?

A. I think we took—there are an awful lot of figures involved,—I think we took two lots at $1,000 a piece——

Q. Two lots at $1,000 a piece, where were they?

A. They were, generally speaking, on the makai side of the tract next to the Pearl Harbor gate and more or less on the gore, that is at the apex of the gore. [448]

Q. Isn't all of this called the gore lot?

A. But the gore has a point; that point is where we proposed to put the theatre. It was that point that had the highest value for store and theatre use, and I think we put in two lots at $1,000 a piece.

Q. How wide and how long?

A. I don't remember; that is all on the map which I can submit to you.

Q. You had some kind of a map?

A. We had a subdivision plan, you have seen it.

Q. You went through that plan and put a price on each lot?

A. Based on our previous experience, yes.

Q. You put a price on each lot?

A. We put a rental value on each lot.

Q. In order to put a rental value you had to put a price on each lot, didn't you?

A. No, just assumed we could get $50 for that quarter acre——

(Testimony of John E. Russell.)

Q. You assumed? A. We knew.

Q. After having made that assumption with respect to each of the lots you added all the figures together, is that it? A. Yes sir.

Q. Then you capitalized that total of prospective rentals at 4%? A. No sir.

Q. What did you do?

A. We had to figure all the improvements in that, and the depreciation and the interest on the money involved, which was very complicated. [449]

Q. Very complicated? A. Yes.

Q. So you calculated you would have to figure interest on the amount of money involved?

A. Yes at 4%.

Q. How much time did you allow to dispose of all of these lots in your calculations?

A. I am not quite sure; I think we allowed ourselves a year, a year or fourteen months.

Q. For how many lots?

A. 265 to be exact.

Q. 265 lots in one year to a year and a half?

A. Something like that.

Q. Commencing in what year?

A. Based on the availability of the land as a whole in April 1941.

Q. April, 1941? A. Yes.

Q. Did you assume that the market as of November, 1940 was going to continue?

A. We thought it was going to accelerate very rapidly.

(Testimony of John E. Russell.)

Q. You thought there would be no end to the defense workers coming into the Territory?

A. Sure there would be an end.

Q. You knew that would come to an end, didn't you? A. Yes sir.

Q. You knew it would be at an end before 1941, isn't that right?

A. No it isn't right at all; we assumed that it was going to go on for two or three years unabated, —for two [450] years from last year.

Q. With the unabated influx of population you calculated you could sell 265 lots, is that right?

A. Yes sir.

Q. And are your calculations on the other two properties made in the same identical way?

A. No.

Q. They are not? A. No.

Q. In the development of the gore lot you assumed, did you not, that there would be no competition from the properties abutting or adjoining it? A. No.

Q. Did you assume that the value, or had you assumed and do you want this Court and jury to understand that the value of the gore lot would remain the same as you indicated if on the makai side of the road the present Army housing were put in and the present Navy housing were put in?

A. I didn't think about that.

Q. You didn't consider that?

A. How could I; that isn't a fair question.

(Testimony of John E. Russell.)

Q. In submitting these figures you didn't consider any Army or any Navy housing in competition to the gore property?

A. If I,—if we had known we would have put our gore lot much higher, because it would have increased the value of the gore lot immeasurably.

Q. For housing? A. For everything.

Q. Now let us reverse the process, let us assume in the [451] calculation you have given the jury here with reference to the remaining two properties on the makai side of the road, assuming that the Navy took all of the gore lot and put its Army and Navy housing on the mauka side of the road, would your opinion as to the value in the long range plan of the property on the makai side of the road be the same?

A. I think under those conditions yes, we would have the same or better values.

Q. You want this jury and this Court to understand that if there were no houses for this Naval personnel and warrant officers and civilian workers at Pearl Harbor and Hickam Field anywhere provided for them in the vicinity that there would still be this high market value for all of these lots?

A. No, I didn't say any such thing at all. Your question is open at both ends. Let's be specific, let's take the present development of the edge of Hickam Field and the present development of the gore, I say those two developments in no way detract from

(Testimony of John E. Russell.)

the land we still have undeveloped this side of those lots.

Q. When you say 'this side of those lots' what do you mean?

A. I mean lying between the edge of the present development on the 77-acre piece and the 290 acres, on the Honolulu side of the 290 acres, the value instead of being decreased would be increased by the putting of those houses there.

Q. That is the property referred to on the map as Field 107 and Field 91?

A. I think that is right. [452]

Q. In other words, it is the unsubdivided area between the Honolulu side of the property condemned and the end of your present subdivision?

A. Yes sir.

Q. It does't refer at all to the property on the mauka side of the road?

A. It does refer.

Q. I want you to tell the Court and jury what would happen to the value of these properties if the Government undertook to condemn on the mauka side of the road an equivalent amount of space for an equivalent amount of houses, what, in your opinion, would happen to the value of the properties which are condemned here?

A. They would increase in value.

Q. For what reason?

A. For the reason, more people to be served in that neighborhood, and another reason, we are

(Testimony of John E. Russell.)

not dealing entirely with defense workers and Naval personnel.

Q. You want the Court and jury to understand that although the development by the United States on the mauka side of the highway, providing facilities for the workers at Pearl Harbor and Hickam Field, which you said a moment ago were the market or part of the market, for the properties, which are condemned, that there would be no change in the value which you have just given for these properties?

A. I say the value would have increased and has increased because we have a very large number of people who want that land who are not defense workers, they are small Japanese farmers, Hawaiian farmers, who are not working at Pearl Harbor. [453]

Q. Which of the two properties, in your opinion, is the more valuable, the property on the mauka side or the property on the makai side?

A. The property on the makai side of the road was more valuable at that time.

Q. Do you think you have received some enhancement of value on the mauka side of the road because of the fact that the Government has put in its housing development?

A. I think that as a long range development we have had some enhancement of value, but it is a long range proposition, a long range matter, they are not going to move in tomorrow.

(Testimony of John E. Russell.)

Q. The theatre you have contemplated would have a great deal more patronage by reason of the present development being put on the mauka side of this highway? A. I should think so.

Q. And the garage? A. Yes.

Q. Do you think a willing buyer would pay $2,000 for that lot when he knew that the Army or the Navy could put in a theatre of their own at any time, able to sell tickets without the payment of taxes?

A. I only know what they wanted to do, they wanted to put a theatre there, what arrangements they had with the Navy I don't know.

Q. And you know that the minute a Commanding Officer of either of those two posts marked these properties out of bounds, or put in similar facilities at Pearl Harbor or Hickam Field, because of rent gouging or for any other reason, that the value of these properties would immediately depreciate, don't you? [454]

A. No I don't know; I have never had that experience.

Q. Never had that experience?

A. No, I don't know anything about that.

Q. It is a natural assumption, is it not, that if the Army and Navy fellows can't go there that the value would be injured?

A. That has never happened.

Q. You don't think the United States Navy and Army and its employees are ever going to get tired of paying through the nose, do you.

(Testimony of John E. Russell.)

A. I don't think they are paying through the nose.

Q. Now this plan which you have contemplated, upon which your valuation is based with reference to the property on the makai side of the road, is that based upon some plan of the sale of the lots?

A. No sir, the leasing of the lots.

Q. The leasing of the lots? A. Yes sir.

Q. Do you have any opinion as to what the fair and reasonable cash market value of these properties would be independent of leasehold as of November, 1940?

A. As I have stated this morning, it is what a buyer could have earned, 4% net on it and still have the accretion.

Q. Can you tell us what the fair and reasonable cash market value of this property was as of November, 1940? A. I gave it this morning.

Q. That was based on rentals at 4%?

A. It was.

Q. Do you have any opinion as to what the fair and reasonable cash market value for the fee simple title to these [455] properties would be?

A. That is the valuation I gave you this morning; that is how the owner of land judges what he will pay, it is judging what interest it will pay to him, and he buys accordingly, that is cash value.

Q. Do you want the Court and the jury to believe that if the properties of the Damon Estate on the mauka side of the road, or anywhere else,

(Testimony of John E. Russell.)

were opened up for development that the properties which are condemned here would remain constant in value?

A. I think I have answered that question two or three times.

Q. Suppose you answer it again. Read the question, please.

(Thereupon the Reporter read the question as above recorded.)

A. I don't want to waste your time or the Court's time——

Q. Please answer the question.

Judge Robertson: I object to the continual interruption of the witness by counsel, witness doesn't have a chance to complete his answer.

Mr. Courtney: I want him to answer the question, Judge.

Judge Robertson: Give him a chance.

A. I want to answer it very frankly—it does require a little time. We have a lot of land out there, the Damon Estate has a lot of land, not only there but elsewhere in the neighborhood, and in the interests of good husbandry we are not going to throw hundreds of thousands of dollars into the development of roads, streets, sewers, all over that great area, we are only going to do it as fast as the demands require us to do it so we can get the best return for our money, and that is what we have been doing. [456]

(Testimony of John E. Russell.)

Q. It is upon that assumption you have made your calculation?

A. It is on that certain knowledge, there is no assumption.

Q. Now this valuation you have given on the lands on the mauka side of the road contemplates their being opened up as of 1943?

A. Makai side of the road.

Q. I mean makai of the Pearl Harbor Road, the 192 acres which was taken for Naval housing and the 77 acres taken by the Army?

A. In reaching the valuations I gave you this morning, we have assumed that without advertising, without effort, without paying any brokers, we could market so many lots a year and we have discounted that, the figures on that basis. Some of those lots would be years off before they would be put on the market at all. We have discounted all that in our calculation.

Q. Tell us the number of lots you had calculated on on the property on the makai side of the road? A. 1266 lots.

Q. 1266 lots?

A. Wait, that is on the makai side of the road, 1265.

Q. 1265 or 1266, how many years did you calculate in your calculation it would require to dispose of 1265 lots? A. I think we took five years.

Q. Five years?

(Testimony of John E. Russell.)

A. I would have to refer to my figures; I think we took five years.

Q. At that rate it would be 1948 before those lots had been sold, is that right?

A. Something like that. [457]

Q. And all the time the conditions would remain the same?

A. No, they would be increasing in value all the time, but we didn't increase our rentals.

Q. You don't believe that any great numbers of defense workers would be coming in until 1948?

A. I don't know anything about that. As far as the rest of the land is concerned it is a matter of the development of the City of Honolulu which cannot be stopped except by condemnation.

Q. Now the Bishop Bank whose lease you have just presented, you are an officer and director of the Bishop National Bank?

A. I am not an officer, a director.

Q. You are also a Trustee of this Estate?

A. Yes.

Q. And I believe the Damon family, heirs of the Damon Estate, are stockholders in that Bank?

A. The Damon Estate is.

Q. Some of the heirs are interested as patrons or stockholders?

A. They may all have accounts, I couldn't say.

Q. Do you know anything about their stock ownership?

A. I know nothing about it; we are trustees of

(Testimony of John E. Russell.)

the Estate of Samuel M. Damon, we have nothing to do with the personal affairs of the beneficiaries of the estate.

Q. I just wanted to know about their being stockholders in the Bank?

A. I don't know anything about that really.

Mr. Courtney: I think that is all, Mr. Russell.

[458]

Redirect Examination

Questions by Judge Robertson:

Q. Referring to this lease to the Bishop National Bank, was that anything other than an ordinary business transaction between the Damon Estate and a third party?

A. I don't see how it could be called anything else, no.

Q. Do you suppose the rent provided for in that lease was less because the Bishop Bank was the lessee?

A. It was a little more. We rent land out there for $80.00 an acre, $50.00 half an acre, $35.00 quarter of an acre, and we charge these people $180.00 an acre and there is no credit risk involved or collection.

Q. Mr. Courtney has spoken to you with reference to the area mauka of the highway, some 500 or more acres, title to which is in the Damon Estate, is there anything in connection with the fact that the Damon Estate owns that title that would cause a change in your opinion of the market value as of

(Testimony of John E. Russell.)

November, 1940 of the areas that we are talking about in this case? A. No sir.

Judge Robertson: That is all.

Mr. Courtney: That is all, Mr. Russell.

The Court: The Court will take a recess now.

(Recess: 11:30 to 11:47 a.m.)

Judge Robertson: In conversation with Mr. Courtney, Your Honor, I find that Mr. Sam Damon is able to answer the questions that Mr. Russell was not able to answer this morning, and I understand it is agreeable to Mr. Courtney that Mr. Damon be returned to the stand so he can answer Mr. Courtney's questions. [459]

The Court: Very well.

(Thereupon

MR. SAM R. DAMON

resumed the witness stand having been previously duly sworn.)

Questions by Mr. Courtney:

Q. The first subdivision made in 1924 consisted of 9.53 acres, will you tell the Court and jury of the number of lots in that subdivision, and the number of years required to dispose of them?

A. There are approximately fourteen lots and that was completely moved out within six months.

(Testimony of Sam R. Damon.)

Q. What about the subdivision that was made in 1929, how many lots in that subdivision?

A. Approximately 100,—the figure of 115 sticks in my mind,—approximately 100.

Q. Shall we say between 100 and 115?

A. Yes sir.

Q. How many years did it take to dispose of those?

A. Two to three years that was 90% occupied.

Q. In two to three years? A. Yes sir.

Q. Now the subdivision of 1933, how many lots in that subdivision? A. 300 plus.

Q. How many years did it take to dispose of those?

A. That took a little over three years to be 90% occupied.

Q. 90% occupancy? A. Yes sir.

Q. Now the 1938 subdivision, do you know anything about that?

A. That was 100% occupancy because only one tenant in each case. [460]

Q. That is the Waterhouse lease?

A. Yes sir.

Q. You don't know about the sub-leases?

A. No.

Q. You know that Mr. Waterhouse leased the whole thing, that is the substance of it?

A. Correct, sir.

Mr. Courtney: That is all.

Judge Robertson: No questions. Before definitely resting, Your Honor, I understand Mr. Courtney wants to put in as part of his direct case some photographs, do you want to put them in at this point?

Mr. Courtney: I do wish to put them in at this point. These Exhibits *have marked* by the Clerk. The first of them refers, by stipulation of all the interested parties, to Civil No. 434, and has been marked Exhibit "D"; it is a plat map with five photographs attached.

The Court: Any objection to that map or photographs?

Judge Robertson: What does that apply to?

Mr. Courtney: This is Exhibit "D", which is Civil 434.

Judge Robertson: Five photographs attached to that.

Mr. Courtney: Yes sir. And Exhibit "E" as to Civil 436.

Judge Robertson: No objection.

The Court: Received as Government's Exhibits "D" and "E", Exhibit "D" and to 434 and "E" as to 436.

Judge Robertson: May I ask Mr. Courtney a question with reference to two of the photographs in Exhibit "D", Photograph No. 1 and Photograph No. 3 in this Exhibit show the roof of a building, will you stipulate, Mr. Courtney, that that is the roof of the Bishop Bank Building? [461]

Mr. Courtney: That is correct. (To the jury): Now, gentlemen of the jury, (exhibiting Government's Exhibits "D" and "E" to the jury), this is a photostat map of Civil No. 434. On this Exhibit you will observe there are certain arrows pointing and each is numbered or marked to correspond with the photographs, 1, 2, 3, 4 and 5. The camera was placed facing in the direction in which the arrow indicates. The first photograph, which is numbered on the plat No. 1 is taken from a position on or about the roof of the present Bishop Bank Building, which we viewed. By reference to the photograph you can carry your finger back to the point where the arrows converge,—that is the location of the camera. It was slightly over the line of the condemned property but shows the whole of the area. By taking the photograph and placing your finger at this point you will see what the camera saw with reference to the areas of this property adjoining the public highway. The same thing applies to Photograph No. 2, there again some portion of the construction of the building of the Bishop National Bank, which is just over the line, is shown, and by taking your point, put your finger at this point, at the convergence of these three triangles facing in the same direction across the property. Each of the photographs is made up in the same way. Photograph No. 5, for example, is a photograph with the camera facing from about the center, slightly off center of the

location down toward the lower portion and that shows the conditions that are here portrayed. It is admitted and agreed between the parties that these photographs show the conditions of the property in December, 1940, after the [462] condemnation but before the present construction which you observed.

Judge Robertson: Some were taken in December and some in January.

Mr. Courtney: The next series is January. You can pass them around now. Perhaps I had better explain the next Exhibit first. The next Exhibit refers to the condemnation for Naval housing in Civil 436, and is made up exactly the same way. There are fifteen photographs attached to this Exhibit, the plat is in my hand, and it shows with the various numbers the location points from which the photograph was taken and the direction in which the camera faced. For example, the gore lot about which we have been talking is Photograph 15 and was taken from the corner, at the extreme left hand side of the map. If you want to see what the property looked like, take photograph No. 15 which is facing across the lot, facing the camera, and you have the condition. By agreement of the party this applies to the condition of the property on January 14, 1941. The condemnation occurred, as you will remember, in November of 1940. Each of the photographs is put together in exactly the same way.

Juror: Why do you show us these?

Mr. Courtney: To show the conditions that obtained there after the condemnation and before the construction was started, the condition of the property. The purpose of the Exhibits, as the juror has properly asked, is simply to show you the condition of the natural ground, or the ground as it existed on January 14th, 1941, before the construction, which you observed on your view, was actually put in. To show you the general topography of the land and you can [463] relate that to what you observed on the occasion of your visit to determine what, if any changes, have been made between that time and the time you observed the property. These are now your property by agreement of everyone concerned. Your Honor, we have had a request from some of the jurors for smaller maps of these properties, and I have undertaken to obtain twelve of them, each is identical except the first which has some coloring, I used one of these maps myself unfortunately.

The Court: At this late date, after they viewed the land and heard all of the evidence, I assumed they had what they needed. The maps that are on Exhibit will be submitted to the jurors.

Mr. Courtney: I am only responding to a request from the jurors. I presume they had in mind making notations on them, and in order to be helpful and in response to that request and without objection from counsel they may be given to the jury if the Court will so advise.

The Court: I rather question the propriety at

this time to give them these maps; they should have been given to them prior to the time they viewed the land, during the progress of the hearing of the testimony; now we are getting along to the time when we are about ready for argument and then later on for the consideration of the jury and at that time they can have before them the Exhibits. I take it this is merely a reduced facsimile of Exhibit No. "B"?

Mr. Courtney: Facsimile of Exhibit "A" of the Government. [464]

The Court: Exhibit "A" yes, that is on the blackboard there, and I think it is better, more comprehensive, would be more comprehensive to the jury than these small maps. I am not altogether in favor of giving the jurors maps after the evidence is in notwithstanding the fact they are copies of Exhibits.

Judge Robertson: May I throw out this suggestion, Your Honor; it may be that instead of handing each juror a copy of this map, this smaller map, suppose the Government should put this smaller map in evidence so that it would be an Exhibit in the case, then when the jury goes out to consider their verdict they would have their smaller map with them, which might perhaps be more convenient than the larger map.

The Court: That idea is agreeable to the Court, to put this map in evidence and to give the jury when they go in for their deliberation each a copy of it.

Mr. Courtney: May they be marked at this time Government's Exhibit "F".

The Court: Are there twelve copies there?

Mr. Courtney: Yes.

The Court: They are received in evidence as Plaintiff's Exhibit "F", with the understanding that they will be available to the jury later.

(Thereupon the facsimile maps above referred to were by the Clerk marked Government's Exhibit "F".)

Judge Robertson: The defense rests, Your Honor.

Mr. Courtney: The Government will call Mr. Crozier for further examination.

The Court: Mr. Crozier will you please take the stand. [465]

REBUTTAL TESTIMONY

MR. CHARLES CAMPBELL CROZIER,

having been heretofore duly sworn, testified as follows:

Direct Examination

Questions by Mr. Courtney:

Q. Mr. Crozier, there has been some evidence here with reference to so-called subdivisions of these properties about which you testified, will you tell the Court and the jury what, in your opinion and from your observation has been the direction of the growth of Honolulu?

(Testimony of Charles Campbell Crozier.)

A. It has been to the East or what is known as the Waikiki section of the city.

Q. How many subdivisions, if any, have been created in that area?

A. Quite a number of subdivisions, dating we will say with 1920, I should imagine there have been some 100 subdivisions of different sizes, from large tracts to small tracts.

Q. And all in the easterly direction?

A. In the easterly side of the City.

Q. Do you know of any subdivision or development or tendency of the population to the West or in the direction of these properties?

A. There has been some, but not to the extent as on the East side of the City.

Q. Tell us, if you please, the number of subdivisions and the experience of those subdivisions running to the East side of the City?

Judge Robertson: Object to that question as too broad. I submit it is entirely irrelevant what the experience of subdivisions in other parts of this Island has been; we [466] are dealing here with Moanalua, Your Honor. Your Honor even had a doubt this morning whether the subdivision made right here in Moanalua, the subdivision of 1924, was admissible. Your Honor left that in, but when counsel propounds a question to this witness as to the experience of subdivisions in other parts of the Island we submit we are going far out of bounds.

Mr. Courtney: If the Court please, the testimony

(Testimony of Charles Campbell Crozier.)

by the respondents in this case was that this land had a value because it was land—that this was the place where the expanding population of Honolulu would go, and that the direction of the expanding population was toward the West or in this direction. I have countered that with the previous testimony of the witness that the direction was toward the East or in the direction of Waikiki, and I now propose to show that these subdivisions which were more in a Westerly direction have been in substance a drug upon the market, that within ten years one has not been completely sold out. The purpose of that is to rebut the testimony of the witness Russell who said that some 1265 lots could be sold within a year or a year and a half.

The Court: What subdivision does your question relate to?

Mr. Courtney: Subdivisions on the Westerly side of the down town area of Honolulu.

The Court: I think it isn't specific enough; direct your question to the specific subdivision.

Mr. Courtney: I propose to do that, I have to start some place. I am asking about three subdivisions to the West and I will take them specifically.

[467]

The Court: Let's pin it down to some subdivision.

Q. How many subdivisions were there on the Westerly side of Honolulu?

Judge Robertson: Objected, too general. I un-

(Testimony of Charles Campbell Crozier.)

derstood Your Honor to rule, and very properly so, that counsel should designate the specific subdivision he was talking about.

Mr. Courtney: I first have to ask how many there are.

The Court: The objection is overruled.

A. From about 1920 to date there have been about 25.

Q. Where were they located?

A. Properly within the City limits from Middle Street toward Nuuanu.

Q. Were there any subdivisions Westerly from that point, from Middle Street toward Pearl Harbor or the property here condemned?

A. With the boundary of Middle Street on the West side we run into the ahupuaa or lands of Moanalua, and they continue on the West side of Moanalua which is adjacent to the Halawa boundary, and that is fee title owned by an estate and they don't sell property.

Q. With reference to subdivisions that occur or occurred between that boundary of the City of Honolulu, how many were there and what was their experience?

Judge Robertson: It is a double question.

Q How many were there?

A. Judge Robertson: The number has already been specified, over 25 he said. Now as to the experience of those twenty-five unidentified subdivisions we submit is entirely irrelevant and immate-

(Testimony of Charles Campbell Crozier.)

rial, clogging up the record [468] with immaterial matters. We are not concerned in this case as to whether somebody put on a subdivision in Middle Street or what their experience was, we are dealing here with 331 acres of land in Moanalua, Your Honor.

Q. Can you identify any of the subdivisions that you referred to in this area?

A. The titles on the West side of the City, that is from the ahupuaa of Moanalua, excluding the land of the Austin Estate, are made up of a great many titles of small owners; many of the kuleanas of the City lie within that area.

Q. What has been the experience with the subdivision of any of that land, as to the number of lots that were involved and the time necessary to dispose of them, whether or not they were sold out to these low bracket groups?

Judge Robertson: Objected to as indefinite, irrelevant, immaterial, having no bearing whatever on the value of these Moanalua lands.

Q. Give us a specific case, Mr. Crozier?

A. One of the outstanding tracts was the Kamehameha Heights Tract.

Q. What was the experience with reference to that tract?

Judge Robertson: Objected to as irrelevant, immaterial, having no bearing on any issues in this case, throwing no light on the value of these lands, and remote in location from the lands in question.

(Testimony of Charles Campbell Crozier.)

The Court: How large a tract was that?

Witness: A tract of 400 odd lots, good sized acreage, on the slopes back of Kamehameha School.

The Court: When was it opened? [469]

Witness: 1926 or 1927.

Q. What was the experience with reference to that subdivision?

Judge Robertson: Objected to as irrelevant, immaterial, having no bearing on any issues in this case, throwing no light on the value of these Moanalua lands, and in point of location remote.

Mr. Courtney: No more remote than the 1924 and 1926 subdivisions of the Damon Estate; it is the nearest in location. The witness is talking about some lands up there on Kapalama Heights.

Witness: Kamehameha Heights.

Mr. Courtney: It is the nearest we could get to the Damon property?

Judge Robertson: That doesn't make it admissible, Your Honor; it is remote, different kind of land, differently situated, it is not admissible evidence and can throw no light on the value of the lands we are talking about.

Mr. Courtney: I submit it will demonstrate the experience with subdivisions, and it will demonstrate also the alleged growth of the population to the West and the amount of development that has occurred, and also comparable values of lots, to show that the experience is.

(Testimony of Charles Campbell Crozier.)

Judge Robertson: We submit that lots up on the hillside of Kamehameha Heights, that there is no comparison in any way either in value or in location, situation, with these lands adjoining Hickam Field.

The Court: I doubt if that matter should be brought in. Objection sustained.

Mr. Courtney: I desire to make an offer of proof. [470] I offer to prove by this witness that, if permitted to testify, he would testify that the experience in the sale of these lots was that after a period of ten to twelve years this small number of lots was not sold. That the real estate development was a financial loss to the developers, and that the prices of the property were even less than that suggested as a price for the lands which are here sought to be claimed as a subdivision. I offer to prove further that the same type or class of tenants or prospective owners as would be and were contemplated by the testimony from and in the testimony of the respondents were and are the same class and type of tenants and occupants as were dealt with in the Kamehameha Heights Subdivision.

Judge Robertson: We object to the offer on the grounds already stated, your Honor, and on the further ground that it does not appear that this witness has any personal knowledge of other subdivisions anywhere.

The Court: If he hasn't knowledge his testimony may be stricken. The objection is overruled.

(Testimony of Charles Campbell Crozier.)

Q. What was the experience with reference to the Kamehameha Heights Subdivision?

Judge Robertson: Objected to on the grounds already stated, which Your Honor has already sustained, and on the further ground that it does not appear that the witness knows of his own knowledge what the experience of the owners of that subdivision was, therefore, would be hearsay.

The Court: That objection seems to be well taken. Better qualify the witness.

Q. Do you know what the experience was with reference to the Kamehameha Heights Subdivision as to the number of lots, [471] and the number which were sold and the time within which they were sold? A. I do.

Q. Tell us what the experience was.

Judge Robertson: May I have a continuing objection to this evidence about which I have objected to, Your Honor.

The Court: Yes, but you had perhaps better point out as time goes on any specific objection you have.

Judge Robertson: I add to my objections then, without repeating those I have already noted, that it doesn't appear how the witness knows what he claims to know. He has not taken it out of the category of hearsay.

Q. Do you know who owned that subdivision?

A. Yes. Mr. McInerny owned what is known as the Kamehameha Heights Tract, which is the second series of McInerny Tracts. In 1924, 1925 and

(Testimony of Charles Campbell Crozier.)

1926, in our boom days, he offered it to the public and I had occasion to write a prospectus on the purchase of the tract for a hui for subdivision purposes. It so happened that a hui of Hawaiian Trust acquired it, developed it through the Improvement District Statute and endeavored to sell it, but shortly thereafter we came into our depression of 1931 and 1932 and the lots remained unsold. The City and County has repossessed a number of the lots by defalcation of street improvements, and some of the lots are still for sale by the Kamehameha Heights hui.

Q. Do you know how many were actually sold in all that time?

A. A very few were sold prior to the depression, but following depression days of 1934 up to about 1940 I [472] presume they liquidated about 90%.

Q. And what have you to say about the price of the lots in that subdivision?

A. Under the first set of prices they asked twenty cents a square foot. Following the depression they sold a lot for $1.00 and you assumed the street improvement. At times got better and they had less lots they added $50 plus street improvements.

Q. $50 a lot plus assumption of street improvements? A. Yes.

Q. Do you know what that would be?

A. Somewhere around 10¢ a square foot.

(Testimony of Charles Campbell Crozier.)

Q. After the improvements and other things were in? A. That is correct.

Q. How many lots in all?

A. Some 300 lots in the subdivision.

Q. How about any other subdivisions in that neighborhood, to the West?

A. There have been very few because the ownerships are so small. Prior to 1920 we did have a number of subdivisions known as the Kapalama Tract.

Q. Let us confine ourselves to the later date. We had a development in 1924 or 1926 in the Damon Tract, do you have any subdivisions in mind in the West since 1924 other than the Kamehameha Heights Subdivision?

A. There were a number of small subdivisions on the lower side of School Street recently, 1939 or 1940, part of the Mendonca Estate was opened up.

Q. How many lots? A. Fifty.

Q. In considering the market for real estate here in [473] Honolulu would consider the number of houses that were built in any year?

A. That would govern the supply and demand.

Q. How many houses were built in Honolulu to June 1941? A. We are on a calendar year.

Q. For the year 1940?

A. There were some 1600 dwelling units built in the City.

Q. That is all in the City?

(Testimony of Charles Campbell Crozier.)

A. City and County.

Q. How about the previous year?

A. Lesser number, some 1200.

Q. 1938? A. About 1,000.

Q. 1937? A. About 1,000.

Q. Do you consider, or is it your opinion that the year 1940, in November, 1940, that the demand at that time was what might be considered a normal demand? A. It was not.

Q. To what extent would you consider it abnormal?

A. By reason of the influx of defense workers and conditions in general.

Q. Assuming a market of some 1265 lots, an offering of 1265 lots, outside Pearl Harbor and Hickam Field, which could not be put on the market until 1943, what would you say with reference to the demand for this land, based on the known development in Honolulu under normal conditions as compared with abnormal conditions?

A. I don't think the demand of 1940 could have waited for 1943. [474]

Q. Now, Mr. Crozier, have you followed the various subdivisions that have been made in all the City and County of Honolulu since you have been in the real estate business or had any connection with it? A. Yes.

Q. I think you were down at the Bishop Trust at one time? A. Yes.

Q. They had some experiences, did they not?

(Testimony of Charles Campbell Crozier.)

A. Yes.

Q. Do you have an opinion of what the ratio would be, based on the known experience here in Honolulu, the ratio between the price which an operator could afford to pay for raw or undeveloped land as contradistinguished from the price at which he expected to sell the improved or subdivided land? A. I do.

Q. Now, what is that ratio, in your opinion and based on your experience?

A. That ratio would vary depending upon the location of the subdivision, the type of subdivision, size of the lot, a potential buyer in the better class of subdivision, that will run 20% of the ultimate selling price.

Q. 20% of the ultimate selling price?

A. That is correct.

Q. Now considering an area such as you have here, at the outskirts, the outside of Pearl Harbor and Hickam Field, what, in your opinion, based on the known experience here in Honolulu, would the ratio between the price which could be afforded to be paid, which one could afford to pay for raw land, as compared with the ultimate selling price of that subdivision? [475]

A. I would say not more than 20%.

Q. Not more than 20%? A. Yes.

Q. How do you arrive at that conclusion?

A. The procedure of prospectus is rather simple: A man will select a site, or a group will select a

(Testimony of Charles Campbell Crozier.)

site, and lay it out under a tentative subdivision. The lots, we will say, are 50 x 100 feet, that is the type of lot that is popular, or 100 x 200, or 207 x 207, which is an acre lot. This hui which is handling the subdivision would consider the demand for the lots; they would have an idea of the ultimate selling price at which these lots could be sold with competition in the open market, and all the other factors that go to determine sale success, they would set a price at 20-cents a square foot. From that must be deducted the cost of improvement.

Q. When you say "improvement", what do you mean by improvement?

A. First you have to secure a map and plot the land, put in your roads, comply with the City and County building ordinances regarding sidewalks, sewers, roads, etc. You have to deduct a portion of your area for roadways; you don't get paid for the area you put into roads.

Q. What else?

A. Take a tract and lay it out about 1-10th is deducted for road area. You lose that value. Now as a rule with subdivisions there is the cost of deeds, commissions, advertising expenses, interest on your money, a period of liquidation out, and in my experience that has been at least ten years, you have to take about a half of your 20-cents out. That leaves you 10-cents.

Q. There must be some profit? [476]

Q. And in all these prospectuses and all these

(Testimony of Charles Campbell Crozier.)

offerings to a hui that profit must *must* be at least 100% gross.

Q. 100% gross? A. Yes.

Q. How much would be a safe margin then?

A. It wouldn't be less than 50%.

Q. Net? A. Net.

Q. Why do you fix that as a reasonable margin of profit which an operator would have to have in mind?

A. He would have to have a safety margin for competition and hazards involved, he has to have that safety margin; he cannot put his lots on the market tomorrow, he has his interest tied up. That has been the experience of each subdivision. In the end the remaining half of this so-called selling price 10-cents, or the figure that is his, after you have deducted all these costs and you divided that by two to the landlord or to the seller, that balance represents 20%, that is where that ratio comes in of original cost and final selling price.

Q. What is the fact, based on the experience here in Honolulu, as to whether or not there is any hazard attached to subdivisions?

A. Our experience has been that there is considerable hazard.

Q. Does that account for the necessity for a greater margin of profit?

A. That is correct.

Q. There has been some testimony by one or two of the witnesses that in arriving at their market

(Testimony of Charles Campbell Crozier.)

value they [477] computed or they considered the ultimate selling prices of the land as at, one said 1942 with respect to the gore lot, one said it could be released in 1941 and sold in about a year, and with respect to the other lots, the rest of the property it appears those properties could not be released until 1943, and that individual said that the total profit which could be reasonably expected by the seller of a subdivision was limited to 16% to 22% on the investment, have you an opinion as to that?

Judge Robertson: That hypothetical question is objected to, Your Honor. It is not a complete and full statement of the evidence in the case which counsel has referred to.

Mr. Courtney: I am perfectly willing to have counsel supply the omission.

Judge Robertson: That is not my job. Before a hypothetical question, based on evidence, is put the putter must put in every element in the evidence; that is not the job of counsel on the other side.

Mr. Courtney: I don't think that is the rule. If counsel objects to the omission of any of the evidence he may point it out, and that is pretty good practice as stated by Mr. Wigmore and others.

Judge Robertson: I don't think Mr. Wigmore said that.

The Court: Read the question.

(Thereupon the Reporter read the question as above recorded.)

(Testimony of Charles Campbell Crozier.)

The Court: I don't believe myself that that is sufficiently concise, assuming this witness did not hear [478] the testimony.

Mr. Courtney: I will withdraw the question.

Q. Mr. Crozier, were you in the courtroom when Mr. Kearns testified? A. Yes.

Q. Did you hear his testimony with respect to the margin of profit which he allowed?

A. I did.

Q. Having in mind that testimony, Mr. Crozier, do you have an opinion, based on the known experiences here in Honolulu, as to whether or not that is a sufficient margin of profit to justify an investor in undertaking the hazards of selling a subdivision of that kind? A. It is not.

Q. Will you explain your reasons?

A. In the first place in interesting an individual or group of individuals, as we term them here 'hui' 16% or 22% margin of profit is not sufficient; you would have to have at least 25% for the hazard you are entering into. To try to interest a group in acquiring title to the property within two or three years then ultimately selling it out and only make 16%, it has not been the case in Honolulu.

Q. What was the rate of interest which prevailed in Honolulu in November, 1940, for loans on land of the character here condemned?

A. At least 6%.

Q. In your opinion, and based on the experience and practice in Honolulu, having in mind the mar-

(Testimony of Charles Campbell Crozier.)

ket for money, is that a proper rate, or is that a reasonable rate of capitalization? [479]

A. That is a reasonable and fair rate of capitalization.

Q. In your opinion, based on the experience here in Honolulu of which you have knowledge, would an investor be justified in depending upon a rate of 4% capitalization? A. He would not.

Q. Do you know what the ratio of loan as to fair market value, the market value here in Honolulu, is for raw lands? A. I do.

Q. What is it?

A. About 60% of the market value.

Q. Of full and true value, market value?

A. That is correct.

Q. And on this basis the ratio or rate of return in Honolulu is 6%?

A. That is my experience.

Q. And as the hazard increases, as the amount of the loan or the amount of the investment increases the 60% of full and true value, does the rate increase or decrease?

A. The rate of interest increases.

Q. The interest rate increases in direct proportion to the hazard assumed?

A. That is correct.

Q. You have followed the loan market here in Honolulu, have you not? A. Yes sir.

Q. Do loans and mortgage and the money mar-

(Testimony of Charles Campbell Crozier.)

ket enter into your business in connection with your work for the Territory? A. They do.

Q. Did you hear the testimony of Mr. Russell this morning with respect to the plans of the Damon Estate? [480]

Q. Have you any opinion as to what would occur if the lands of this estate were free and open, owned by different investors or owners, as to whether or not the release of the lands on the mauka side of the road, the five or six hundred acres on that side of the road, would influence or have any effect on the market value of the properties that are here condemned?

A. It would materially influence it.

Q. In what respect?

A. In the question of hazard, of competition.

Q. What in your opinion, in any proportion you can give, would be the effect upon the value of these lands which are condemned here if a comparable area on the mauka side of the road were released, do you have an opinion, in terms of percentage, if not just indicate what, in your opinion, would be the effect, so the jury will have it in mind?

A. I don't quite get your question.

Q. I tried to ask you, in terms of percentage, if you are able to fix it in terms of percentage, what would be the effect upon the value, the fair market value of the lands that are condemned here if a comparable area, that is an area of some three hun-

(Testimony of Charles Campbell Crozier.)

dred odd acres were released in the immediate vicinity or on the mauka side of the road?

A. The value should remain the same.

Q. I am talking now about the competition, do you understand my question,—if competition were introduced to these tracts of land and a subdivision was opened up on the mauka side of the road, what, in your opinion, would be the effect on this subdivision? [481]

A. It would affect it downward.

Q. In what way?

A. It would have competition and your property, if you paid too much for it, would have to stand a lesser value.

Q. In other words, competition would affect it downward? A. That is correct.

The Court: Have you any other witnesses?

Mr. Courtney: I have no other witnesses.

The Court: It is now fifteen or sixteen minutes to 1:00 o'clock. Will you have this witness long,—it is time for the day's adjournment.

Mr. Courtney: I have some other questions. I think, perhaps, this is a good place to stop. I think we can finish tomorrow, obviously we can't finish today.

The Court: The jury is excused until 9:00 o'clock tomorrow morning. Now, we are undoubtedly getting near the close of the evidence in the case. I think, with the exception of rebuttal, you have heard all of the evidence, that is the evidence in chief, and

(Testimony of Charles Campbell Crozier.)

the Court admonishes you to keep your own counsel and wait until you hear the argument of counsel and the instructions of the Court as to the law pertaining to the case before you try to arrive definitely in your individual minds as to what your verdict will be. Just keep open minds until you get the case for consideration before you in the juryroom and then compare notes fully and remember the facts as well as you possibly can. Adjourned until 9:00 o'clock tomorrow morning.

(Adjourned: 12:50 o'clock p.m.) [482]

(On Tuesday, the 29th day of July, 1941, at the hour of 9:10 o'clock a.m., all the parties being present in the courtroom, further proceedings were had as follows:)

The Clerk: Civil Cases Numbers 434 and 436. Cases called for further trial.

The Court: The jury are all present and in the box.

Continuation of Direct Examination on Rebuttal of

MR. CHARLES CAMPBELL CROZIER.

Questions by Mr. Courtney:

Q. Now, Mr. Crozier, did you hear the testimony in this courtroom with respect to what is called the 1933 subdivision? A. I did.

(Testimony of Charles Campbell Crozier.)

Q. Testimony as to rentals and what not?

A. I did.

Q. As a result of that testimony, based upon your own experience, have you an opinion, or are you able to form an opinion as to what a fair and reasonable apportionment of the values represented by that testimony, or stated in that testimony would be? A. I do.

Q. Now, will you illustrate——

Judge Robertson: Objected to as not rebuttal, Your Honor.

Mr. Courtney: It certainly is, the testimony with regard to the 1933 subdivision is in in the case in chief for the defense.

Judge Robertson: We didn't go into the matter of apportionment,—what has that got to do with it.

Mr. Courtney: We have a right to have this witness demonstrate what he considered to be a fair and reasonable [483] apportionment of that value insofar as that evidence is intended to reflect the market values of this property, to compare it with the testimony of this witness, and that is the purpose of the testimony.

The Court: Proceed. Overruled.

A. In the subdivision of 1933, which is Kaloaloa Acres "B", or Second Series, the lots are of different size; they are the acre lots; they started out originally acre lots and at $80 net per annum of a 6% capitalization the value of the lot would work

(Testimony of Charles Campbell Crozier.)

out $1,333.00, that is the lot under its finished condition, ready for leasing.

Q. All right now, considering that as a basis, how much could a willing buyer afford to pay for the raw land?

Judge Robertson: Objected to as improper rebuttal, Your Honor. We are not here dealing with the value of that land, we are dealing with the value of 331 acres.

Mr. Courtney: That was offered as a comparison, Your Honor.

The Court: What land are you talking about?

Mr. Courtney: The 1933 subdivision.

Witness: Kaloaloa Acres, "B" Series, or Second Series, just mauka of the John Rodgers Airport.

Judge Robertson: We put in evidence the net rental that the Damon Estate derives from that area, which is admissible, tending to show the productive capacity of land in that neighborhood. The question of value per acre of that particular tract we did not go into,—has no bearing on the issues in this case, consequently this testimony that is not offered is not rebutting anything we put in evidence. If they can show that our statement [484] of the amount of rents that that area produced is erroneous that certainly would be proper rebuttal, value per acre of that land is not.

Mr. Courtney: If the Court please, the Court will remember that the Government objected to the rental valuation being introduced, because the Gov-

(Testimony of Charles Campbell Crozier.)

ernment called the attention of the Court to the fact that it would afford no basis for comparison in the market value of this property. That rental was for a developed subdivision with roads and other utilities, that was based upon the completed value and that evidence was received over the Government's objection. Now for the purpose of assisting the jury in comparing, or in weighing values, we have a right in rebuttal to show what the raw value of that land would be, because we are here dealing with the raw value of land.

Judge Robertson: The raw value of that particular area doesn't rebut anything that has gone in on the case for the defense, and it doesn't bear on the value of the 331 acres involved here.

The Court: I am inclined to believe that it is not rebuttal.

Mr. Courtney: I desire to make an offer of proof. Does the Court sustain the objection?

The Court: Yes.

Mr. Courtney: I desire to make an offer of proof. I offer to prove by this witness——

The Court: Just a moment now. Since I have in mind that that is not proper rebuttal I think you had better make your offer of proof out of the hearing of the jury.

Mr. Courtney: Very well, Your Honor. I offer to [485] prove by this——

The Court: If there is to be argument the jury will be excused.

(Testimony of Charles Campbell Crozier.)

Mr. Courtney: I don't believe there will be any argument.

(Thereupon Mr. Courtney made his offer of proof to the Court, in the presence of counsel for the defendants, and out of hearing of the jury, as follows:)

Mr. Courtney: I offer to prove by this witness that, if permitted to testify, he would in comparing the value, the rental value of $80.00 testified to as the rental of the 1933 subdivision "B" of the Damon Estate, testified to in defendant's direct examination, was not a comparable value for the following reasons: That at a capitalized rate of 6%, which this witness says is a fair and reasonable rate of capitalization for subdivisions of the character in question, based upon experiences here in the Territory, and considering the hazards involved, would represent a market value of the lots of $1,333.00 per acre. That in order to consider a subdivision it would be necessary to reduce the total acreage in valuation by 10%, representing that portion of the area which would be required to be devoted and dedicated to roads under the provisions of the Territorial ordinances effective in November, 1940. I offer further to show that the cost of establishing a road would be approximately $2.50 per running front foot per lot, or a total of $500.00 for each lot. That the net value of each lot, therefore, would be reduced to $700.00. That a fair and reasonable apportionment between a willing buyer and

(Testimony of Charles Campbell Crozier.)

a willing seller, considering the costs and hazards of development, and based on that rental, would [486] make a total payment of $350.00 for the lot, a maximum which could be paid and still allow an economic use and disposition of the property. That, therefore, the comparison of those rental values has no probative value in this case and do not reflect in any sense the fair and reasonable value of the properties in question.

Judge Robertson: We object to the offer because in the first place it does not rebut anything that has gone in on the part of the defense, secondly, it is argumentative and contains legal argument as well as theories as to facts. Further, the witness' opinion as to what that subdivision may have cost to lay out is not the best evidence, the actual cost is obtainable if it is proper evidence. This witness cannot give his theory or opinion of what that subdivision cost because it is not a fact but a theory.

Mr. Courtney: I further offer to show, in the same connection, the provisions of the Territorial Zoning Law as of November, 1940, prior to the condemnation proceedings——

Judge Robertson: It is not for this witness to testify what the Territorial provisions are, that is for the Court to decide.

Mr. Courtney: And as part of the testimony of the witness.

Judge Robertson: It is his opinion of what the local law requires.

(Testimony of Charles Campbell Crozier.)

Mr. Courtney: I am not asking his opinion, I am asking——

The Court: I still don't believe it is properly classed as rebuttal. [487]

Mr. Courtney: Is that the basis of the ruling only that it is not proper rebuttal?

The Court: Yes.

Mr. Courtney: In that case I shall ask leave to re-open the case in chief for the purpose of offering the evidence.

Judge Robertson: On the idea of reopening the case, the rest of my objections would apply. We are not dealing with theories as to the cost of laying out that subdivision. If that is what they want the facts would be easily obtained from the records of the Damon Estate. This opinion, hearsay opinion, of this witness as to what that subdivision cost is neither the best evidence or a material factor.

The Court: You speak of reopening, for what purpose?

Mr. Courtney: For this purpose only, this testimony.

The Court: Denied.

Mr. Courtney: The objection and the ruling, I understand, only runs that it is not rebuttal evidence. I have to be pretty careful of my record, as I hope you will understand.

The Court: You offered as rebuttal, the offer to prove so and so by this witness?

Mr. Courtney: Right.

(Testimony of Charles Campbell Crozier.)

The Court: That was objected to and sustained.

Mr. Courtney: Now I ask to reopen the case in chief for the purpose of putting in the same evidence?

The Court: That is denied.

Q. Now, Mr. Crozier, do you know whether there are other areas in the vicinity of Pearl Harbor and Hickam Field [488] that are capable of development for housing or business purposes?

A. There are.

Judge Robertson: Objected to as not proper rebuttal, Your Honor. The defense did not go into the question of other areas. We are dealing here with one particular area, 331 acres,—we are not dealing with Pearl Harbor in general; there is nothing to that effect put in on the part of the defense. This is not rebuttal.

Mr. Courtney: The testimony of the witnesses for the defense was that the presence of other areas would not offer any competition to the development of these areas. I propose to show not only the extent of the areas offered are owned by these defendants, but I also propose to show the areas of other individuals or other owners in this vicinity, all of which is capable of being used.

Judge Robertson: The defense did not go into other areas than Moanalua. We are dealing here with Moanalua, not Pearl City or Pearl Harbor. Nothing of that kind was offered as part of the defense in this case. If any reference was made to

(Testimony of Charles Campbell Crozier.)

any such areas it was on cross-examination, which would not be a ground for subsequent rebuttal, but the value or availability of other areas around Pearl Harbor, other than Moanalua, form no part of this case. It doesn't rebut anything.

Mr. Courtney: I should like to make an offer of proof.

The Court: The rules of rebuttal are rather strict, and I don't believe that comes within their scope. Sustained.

Mr. Courtney: I desire to make an offer of proof.

The Court: The same way? [489]

Mr. Courtney: Yes. The Government offers to prove by this witness that, if permitted to testify, he would state that there are some 1500 acres of land, equally well situated and equally well adapted to development for housing or other residential facilities, in the immediate vicinity of Pearl Harbor and its environs, all of which are, in his opinion, or would be equally adaptable to such development and that such areas would have to be considered by a willing purchaser and a willing seller in a fair transaction, being under no compulsion, in determining the fair market value of this property.

Judge Robertson: We object to the offer on two grounds: First, it doesn't rebut anything that has gone in on the case for the defense. In the second place, the question is vague, indefinite and uncertain, and when counsel talks about Pearl Harbor and its environs, he is talking about a considerable

(Testimony of Charles Campbell Crozier.)

portion of the area of this Island and not properly Moanalua and its immediate vicinity at all.

Mr. Courtney: And I would add to that the word contiguous, contiguous to Pearl Harbor.

Judge Robertson: Contiguous to Pearl Harbor might be ten miles or more away and still be contiguous to Pearl Harbor.

The Court: I don't think that is proper rebuttal.

Mr. Courtney: Is that the only basis for the ruling?

The Court: Yes.

Mr. Courtney: I ask leave to reopen the case in chief for the purpose of showing——

Judge Robertson: Same objection, referring to a lot of side issues here, this Kamehameha Heights Tract, for [490] instance, simply clogging up the record thereby drawing herrings across the trail, it looks to me, for the confusion of the jury. The jury is to consider the value of the Kamehameha Heights Tract and the value of lands not surrounding Pearl Harbor.

The Court: I felt myself that that was a mistake; it is too far away, too different in character, kind and elevation; everything is different. I don't believe, upon second thought that I should have allowed that Kamehameha Heights to go in. It came as a surprise and I was perhaps overly willing that my views should have a wide range of comparison. Where is this land that you want to show?

Mr. Courtney: Immediately surrounding Pearl

(Testimony of Charles Campbell Crozier.)

Harbor, owned by other individuals than the Damon Estate, and on the highway.

The Court: That is the Campbell Estate.

Judge Robertson: We are going into the Campbell Estate now.

Mr. Courtney: That is contiguous to Pearl Harbor.

The Court: Contiguous to Pearl Harbor doesn't mean within the scope.

Mr. Courtney. Abutting on Pearl Harbor,—there are two sides of Pearl Harbor, one is away down country and the other is here on a line of frequent transportation communication. Where is the land?

Mr. Courtney: Abutting Pearl Harbor, all around the area, the water front, having the same means of access and the same opportunities for development on the same highway. [491] In this case we have to go into the location, character of soil, adjacent to the highway.

Judge Robertson: That isn't a handicap.

Mr. Courtney: None as far as Moanalua goes, but it doesn't foreclose us from going in the other direction to show what competitive land would be; the very nature of the case makes that necessary.

Judge Robertson: Comparable to Kamehameha Heights?

Mr. Courtney: I am going to make an offer of proof and I am sure I know what I am talking about.

Judge Robertson: Simply clogging up the record.

(Testimony of Charles Campbell Crozier.)

The Court: You offer to prove that all the land or a large part surrounding Pearl Harbor, beyond this land is open or available——

Mr. Courtney: Adaptable.

The Court: Adaptable——

Mr. Courtney: And available. I can't substitute my testimony and my opinion for that of the witness; he will have to testify where that is.

Judge Robertson: You can readily see where that is going to lead.

The Court: You be a little more specific; I am somewhat inclined to allow you to reopen, but I don't want to allow a blanket proposition.

Judge Robertson: Of course, the testimony of this witness on the side issues is not conclusive; I have a right to rebut that; it simply means having side issues to the main issues in this case.

The Court: I don't like to shut out any comparative lands that are available as he says. [492]

Mr. Courtney: The lands to which I refer are the lands of McGrew and McCandless, on the same road, having the same access, approximate to the same environ, all of which are available and open to development.

Judge Robertson: In other words, Pearl City is included in that. Are we going to drag in here values in Pearl City? I can call half a dozen witnesses on that subject and after all their testimony is in what would that have to do in determining the value of these 331 acres. We will be here two or three days on this side issue if we ever get started.

(Testimony of Charles Campbell Crozier.)

The Court: I think that is so. What is this point here, right here (indicating a point on a map which has been exhibited to the Court).

Mr. Courtney: It is marked Aiea. From Aiea to Pearl City.

The Court: What is the distance from here (indicating a point on the map) to Aiea?

Mr. Courtney: According to the scale of the map I should say about two miles, it is the same distance in that direction as the distance from the property under cultivation and the Damon subdivision to the East.

The Court: I will allow you to re-open to show that this land from Aiea to Pearl City is available for the market.

Q. (By Mr. Courtney): Mr. Crozier, is there any other land——

The Court: Now this is not rebuttal, I take it?

Mr. Courtney: Very well, sir.

The Court: Do you want to reopen your case for the purpose of this question only? When you are ready to do that, when you finish with the witness on rebuttal, make [493] motion in open court.

Mr. Courtney: Very well, Your Honor.

Q. Now, Mr. Crozier, do you know anything about the development, or are you familiar with the development around Schofield? A. I am.

Judge Robertson: Objected to, Schofield is no part of the defense in this case. Furthermore, Your Honor's ruling on this application of Mr. Courtney

(Testimony of Charles Campbell Crozier.)

to reopen was limited to a specific area which Your Honor mentioned in making that ruling. That did not include Schofield at all.

The Court: We have not come to the re-opening, Judge, as yet, the witness is still on in rebuttal.

Judge Robertson: I understood counsel had closed his rebuttal and was permitting under Your Honor's permission to re-open. Mr. Courtney, are you still rebutting?

Mr. Courtney: The Court ruled that at the conclusion of whatever rebuttal testimony I had I could make a motion to re-open, and I haven't done so yet.

Judge Robertson: If counsel is still on rebuttal, I object to the question relative to Schofield on the ground that it is not rebuttal, doesn't meet anything that has been offered in the way of defense in this case.

Mr. Courtney: The question is whether he is familiar with that area.

Judge Robertson: Entirely immaterial whether he is familiar with Schofield or not, in this case we are talking about Hickam; there are many miles between Hickam and Schofield. Nothing with reference to Schofield is involved in the defense of this case. [494]

Mr. Courtney: We offer it as a comparable center of activity. We further offer to show what happened to the environs of Schofield, Wahiawa and the other environs, when those environs were

(Testimony of Charles Campbell Crozier.)

marked out of bounds. We offer it as a comparison.

The Court: Sustained.

Mr. Courtney: (Offer of proof made to the Court in the presence of counsel for the defendants but out of hearing of the jury). I offer to prove that the environs of Schofield Barracks, which garrisons a full division of troops and is at present garrisoned by a military and civilian personnel in excess of fifty thousand, that the development of the two of Wahiawa, which abuts on the military reservation, has not exceeded in population 5,000; that the only stores abutting on the military reservation are three in number. I further offer to show that from time to time, to the certain knowledge of this witness, the Commanding Officer of Schofield Barracks has declared Wahiawa and its environs to be out of bounds for infraction of military discipline. That in those instances business in the town of Wahiawa has been at a standstill. The entire area, or most of it, is dependent upon the patronage of the military personnel. That that situation compares with the situation which would obtain outside the gates of Pearl Harbor and Hickam Field and subject to the same restrictions. That evidence is offered to rebut the testimony of Mr. Russell and the other witnesses who declared that in their opinion that should the area there be marked out of bounds by the Commanding Officer of either the Naval or Military reservation it would not affect the value of this [495] property or the opportunity for doing business on

(Testimony of Charles Campbell Crozier.)

it, those witnesses having testified in part that the proposed demand, or the supposed demand, for these properties rested to some degree on the military, naval and civilian personnel of both those reservations.

The Court: Denied.

Q. (By Mr. Courtney): Mr. Crozier, directing your attention again to the testimony respecting the number of houses that have been built in Honolulu which you testified to yesterday before we adjourned, do you have an opinion and do you know what percentage of the development or of the number of houses in each year were built in the direction of these properties as against other locations in the City?

Judge Robertson: Objected to as not proper rebuttal. We did not go into that subject at all as part of our defense. Mr. Courtney did ask Mr. Castro how many new houses had been built on this Island. That, however, was Mr. Courtney's own affair, forms no part of the case for the defense, and the statement that might be elicited from this witness in reply to this question does not rebut any part of the defendant's case.

Mr. Courtney: If the Court please, the witness testified, without objection, that there were 1800 houses built in 1940, perhaps 1,000 in each of three preceding years. I propose now to ask him the distribution of that building.

(Testimony of Charles Campbell Crozier.)

Judge Robertson: The fact that I was liberal yesterday in not objecting to that piece of evidence does not affect the validity of the objection here. It seems to me we have had enough in the way of side issues here, too many in fact. I now object to this as not rebuttal. [496]

The Court: Sustained.

Mr. Courtney: I would like to make an offer of proof.

(Thereupon Mr. Courtney made his offer of proof to the Court, in the presence of counsel for the defendants, but out of hearing of the jury, as follows:)

Mr. Courtney: I offer to prove that if this witness were permitted to testify he would testify that in the building program in Honolulu, about which he was permitted to testify yesterday on direct examination, and in rebuttal of the testimony of the witnesses previously sworn, that the distribution of houses was approximately as follows: About 50% on the Easterly side of Honolulu, in the opposite direction from the properties condemned, about 25% in the country areas, approximately 25% in a Westerly direction from Honolulu.

Judge Robertson: All of which rebuts nothing in the defendant's case.

The Court: Denied.

Mr. Courtney: Exception. Now the Government will ask leave to reopen in conformity with the ruling of the Court.

(Testimony of Charles Campbell Crozier.)

The Court: The motion to reopen is granted within the scope as stated to counsel by the Court.

Q. (By Mr. Courtney): Mr. Crozier, are there other lands than those owned by the Damon Estate in the environs of Pearl Harbor and Hickam, or of these properties, which in your opinion are open for development as subdivisions or building lots for residential purposes of any kind or business purposes? A. There are.

Judge Robertson: The question is objected to on the [497] ground it is not rebuttal; is broader than Your Honor's ruling.

The Court: The motion was to reopen the case in chief for the plaintiff. This doesn't come in the classification of rebuttal. The motion to reopen was granted within certain limitations. This question I believe comes within that limitation. Objection overruled. You may answer.

A. There are other areas.

Q. Can you tell us where they are located?

A. There is a location between——

Judge Robertson: I object to that question, Your Honor, and ask that counsel's question be limited to the ruling made by Your Honor; that he had the privilege of reopening with reference to a certain particular area at Aiea; counsel is now proceeding to box the compass. I ask that the question be limited to Your Honor's ruling.

The Court: Between Aiea and Pearl City.

Mr. Courtney: I want him to tell me where they

(Testimony of Charles Campbell Crozier.)

are. It was not proper for me to lead him, but I will ask him if you want me to ask him leading questions.

The Court: I don't want you to lead the witness, but without leading the witness you can ask him what lands are available between Aiea and Pearl City.

Q. Do you know of any land between Aiea and Pearl City? A. I do.

Q. In your hands you have an exhibit, which is marked Exhibit "G" for the Government, are the locations of those lands with reference to the area condemned shown on that Exhibit?

A. They are. [498]

Q. Will you mark that please in pencil.

A. (Witness does so.) After passing to the West on Kamehameha Highway you come to the lands known as the McGrew land; passing over the McGrew land you come to the lands of the Bishop Estate.

Q. Do you have an opinion as to the number of acres, approximately?

Judge Robertson: Object to the number of acres as not a matter for opinion, Your Honor; if this witness knows what he is talking about he can so state, we are not interested in his opinion.

Mr. Courtney: I asked if he could approximate the number of acres in that area?

Witness: Are you waiting for me?

(Testimony of Charles Campbell Crozier.)

The Court: Yes.

A. In the lands of the McGrew Estate there are approximately 75 to 100 acres makai of the road. Crossing over that we come into the lands of the Bishop Estate and McCandless Estate known as the lands of Kalawao, there would be approximately 100 acres on the makai side of the stream. Crossing the Kalawao Stream we come to the lands belonging to the Austin Estate, 75 acres, makai of the road there.

Q. How about the lands mauka of the road, have you an opinion as to the approximate number of acres on the mauka side of the road?

A. They run into big land there; they are all ahupuaas that run to the mountain tops, similar to the lands of Moanalua.

Q. Similar to the lands of Moanalua?

A. That is correct.

Q. Extending from the mauka side to the mountains? [499]

A. From the Pearl Harbor shore to the top of the mountain.

Q. Now on the map marked Government's Exhibit "G", you have indicated two cross marks, are those locations on the lands on the makai side of the road to which you refer?

A. The crosses represent the lands of the McGrew Estate, the Bishop Estate and the McCandless Estate.

(Testimony of Charles Campbell Crozier.)

Q. And there are other lands on the mauka side of the road?

A. Running clear to the mountain top belonging to the same estate.

Mr. Courtney: We offer in evidence Government's Exhibit "G" as illustrative of the witness' testimony and to locating the area referred to.

Judge Robertson: Has he made any marks on this other than the two crosses?

Mr. Courtney: No.

The Court: Received in evidence as Plaintiff's Exhibit "G".

(Thereupon the map referred to was received in evidence and by the Clerk marked Government's Exhibit "G".)

Mr. Courtney (Exhibiting Government's Exhibit "G" to the jury): Gentlemen, I show you Government's Exhibit "G", which has, I think, all the legends on it to help you determine the distances and the area to which the witness has testified. He has placed two cross marks on it. Scale of the map, location of these properties are shown on this map; the ahupuaas are not shown, but they run from the mauka side of the highway to the mountains. This you can have for your deliberations. That is all.

The Court: The witness is yours, Judge Robertson. [500]

(Testimony of Charles Campbell Crozier.)

Cross Examination

Questions by Judge Robertson:

Q. You were speaking yesterday, Mr. Crozier, of a tract of land known as Kamehameha Heights, weren't you? A. That is correct.

Q. Kamehameha Heights was first put on the market by a hui, was it? A. That is correct.

Q. Did you have any personal connection with that hui? A. I did not.

Q. You were not a member of the hui?

A. I was not.

Q. Were you employed by the hui?

A. I was not.

Q. What was your occupation at that time?

A. In charge of the Real Estate Department of the Bishop Trust Company.

Q. The Bishop Trust Company had nothing to do with the offering of that land to that hui?

A. Not at all, Judge.

Q. How much do you know about the Kamehameha Heights improvement with respect to the statements made by you yesterday?

A. At the time that the McInerney's decided to sell Kamehameha Heights the Bishop Trust Company, in its Real Estate Department, went into the matter of writing a prospectus in endeavoring to acquire it. It was on the open market for sale. Similar other institutions did the same thing and eventually they accepted the Hawaiian Trust Com-

(Testimony of Charles Campbell Crozier.)

pany's proposition, represented by the hui that was within the Hawaiian Trust Company. Being in the business we followed it, we followed the activity of the Hawaiian Trust Company and the hui. [501]

Q. Yes but the matters you testified to yesterday were matters that you had information as to from others, was it not?

A. That is correct.

Q. They were not matters of your own individual knowledge?

A. As I understood that the information was authentic my information was actuality. In other words, as the lots were selling for that price and the subdivision was as laid out the knowledge was correct.

Q. You assumed that what you heard was correct? A. That is correct.

Judge Robertson: Very obviously hearsay, Your Honor.

Q. If you were posted by hearsay as to the ins and outs of the Kamehameha Heights matter you evidently know more than you testified to yesterday, I will ask you if you understand that the McInerny Brothers had purchased 123 acres of land in that locality from the Bishop Estate?

A. I understand that that is their title, Judge.

Q. And having bought it the McInernys themselves subdivided it and put it on the market, the lower portion, the makai portion of that area?

A. Known as the McInerny Tract.

(Testimony of Charles Campbell Crozier.)

Q. Yes and that portion of the area that the McInernys put on the market covered 69 acres, is that right?

A. I don't know the acreage, Judge, it was in different blocks, A, B, C, D and H. It was the lower section.

Q. And after the McInernys had subdivided that area into lots they sold it at enough to pay the Bishop Estate for the entire 123 acres and made a substantial profit over and above that?

A. That is my understanding of the McInerny ownership. [502]

Q. Now then this hui that came along purchased from the McInerny Brothers the area of 44 acres running mauka of the tract, which they put on the market, is that correct? A. Correct.

Q. And this hui paid the McInerny Brothers for those 44 acres $250,000.00?

A. That was the purchase price and a purchase mortgage.

Q. In other words, they paid the McInerny Brothers $5,680.00 per acre for that area?

A. That is correct, with a purchase mortgage, Judge.

Q. The purchase price was $250,000.00?

A. That is correct.

Q. Had you seen that 44-acre area before it was subdivided and improved?

A. Yes, Judge, we went on to it in its natural condition with the idea of writing a prospectus.

(Testimony of Charles Campbell Crozier.)

Q. In your prospectus did you state that that land was covered by many rocks?

A. It certainly was, Judge. The land is known as pohaku.

Q. In other words, a part of the area is known as Kalai Pohaku, the rocky point?

A. I thought it meant more rocks than usual.

Q. In addition to being rocky, that 44-acre area was quite steep, was it not?

A. Yes; went into the Pali environment of the slope.

Q. Some so steep as to be unfit for development and human habitation?

A. Yes, other than on a plat or a map.

Q. Notwithstanding this the hui paid $5,680.00 an acre for that land, did they not? [503]

A. They did, Judge.

Q. Now then, after having paid $5,680.00 per acre for those rocks, do you know how much they spent in subdividing and getting that land ready to put on the market?

A. They petitioned under the City and County Ordinances for a City Improvement development district, owning the land with 100% ownership, and, therefore, had the County finance the road construction under an improvement district.

Q. Do you know that after paying $5,680.00 per acre for that land they spent 24-cents per square foot, improving it, getting it ready for the market?

A. That is correct, Judge.

(Testimony of Charles Campbell Crozier.)

Q. As a real estate man you know that it was obvious that that enterprise was doomed to failure from the very start, don't you?

A. That is correct.

Q. I think you stated yesterday, if I heard you correctly, that the demand for subdivided areas at Moanalua couldn't wait until 1943, is that right?

A. I didn't mean it exactly that way, Judge. In its broad sense we had very little demand in '31, '32 and '33; we were in our doldrums, and that picked up in '34; it accelerated in the last two years, the last eighteen months. Now the demand today is abnormal, Judge. What is in store for us in 1943 and the future is problematic, bearing in mind when you buy land or lease land under a long term you have to have some assurance of speedy ownership or occupancy.

Q. Depending on whether you are an optimist or a pessimist, is that it?

A. Yes sir, Judge, very much so. [504]

Q. As a matter of fact notwithstanding an occasional slump, the value of real estate on this Island has been continuously and ceaseless upward, has it not? A. As a rule I would say yes, Judge.

Q. When you say that in '31, '32 and '33 we had little demand, who do you mean by "we"?

A. The general buying public and the general occupying public. The only stability we had in those years was our rural areas that were leased to our big corporations such as sugar. Many pine-

(Testimony of Charles Campbell Crozier.)

apple leases were abandoned, pineapples didn't have the stability. In other words, the only land that had real stability was the sugar and the ranch lands of the Territory.

Q. You have in mind the depression which began in 1930? A. July 1, 1929, Judge.

Q. You put it back to 1929, do you?

A. I know the date very well.

Q. During that particular misfortune people who lost on the stock market, most of them were obliged to sell their homes in order to keep their heads above water, weren't they?

A. My experience, Judge, was that the man who played the stock market wasn't the man who was a home owner and the like. I don't think there was any connection between the majority of home owners and the majority of our land ownership in so far as the activity of the stock market was concerned.

Q. During that period you refer to there were many mortgages foreclosed and mortgagors sold out?

A. That is correct, equities were small and the cost of carrying the unpaid balance was beyond the man's earning power. [505]

Q. Now the situation improved following 1933, didn't it?

A. I would say after January 1st, 1934, Judge.

(Testimony of Charles Campbell Crozier.)

Q. And the improvement was accelerated in '38, '39 and '40?

A. I would say the beginning of '39 saw the acceleration.

Q. Prior to any National Emergency?

A. Yes, knowing what was coming; the war started in September of 1939 and the beginning of 1939 saw the conditions change.

Q. But the United States was carefully evading getting into the war, weren't they, in other words this National Emergency which has created the spurt at this moment took place in May of 1941, did it not? A. That is correct, Judge.

Q. The last census showed a large increase in the population of Honolulu, didn't it? A. It did.

Q. And with the increase in population the demand for homesites would automatically increase, would it not? A. It would.

Q. Referring to the ratio between the cost of land and the selling of it after it is subdivided, I think you stated yesterday there was no hard and fast rule that could be applied in that matter?

A. That is correct.

Q. There is a great variance, I think you stated, on the situation and probable demand for the lots and also involving the particular plan of subdivision, whether advantageous or not, that is so, isn't it?

A. That is correct; all those factors have to be taken into consideration. [506]

(Testimony of Charles Campbell Crozier.)

Q. You referred yesterday to real estate mortgages that yield 6%, did you not?

A. I did.

Q. Have you any idea what proportion of the millions of dollars in this Territory looking for investment might be specified in real estate mortgages?

A. That can be easily obtained. We have our building and loan associations that loan on real estate; we have our trust companies that loan on real estate; we have our banks that loan on improved real estate. I would say that the money invested in real estate mortgages in the Territory would be fifty million dollars.

Q. You haven't any actual knowledge of that fact, have you?

A. By a casual adding up of the bank loans and the trust company loans and the building and loan associations,—the building and loan associations loans alone are in excess of ten million dollars.

Q. The building and loan associations do a particular class of business along their own peculiar lines, don't they? A. That is correct.

Q. Wouldn't you say that the President of a Honolulu bank would be in a better position than you are to judge of the ratio of real estate mortgages compared to the amount of capital in the Territory looking for investment?

A. He would have the same information that I would have, Judge; he would take the same infor-

(Testimony of Charles Campbell Crozier.)

mation and make the same deductions; you have a tremendous amount of property that is sold on the instalment plan, that you also would have to consider [507] in the unpaid balances on real property.

Q. Isn't it a fact that in recent times, and at the present time, the Federal Housing Administration, for the purpose of encouraging home building, is taking up a large portion of these real estate mortgages?

A. They only insure them, Judge. You can't get money from them, only through the HOLC; you can't get a direct loan from the FHA, you have to contact one of the banks or those affiliated with the Housing Authority, Housing Administration.

Q. If the mortgage is approved by the Federal authorities?

A. The Federal Housing Administration guarantees to the bank that the mortgage will be paid.

Q. That is part of the procedure?

A. Yes.

Q. What rate of interest do those mortgages provide for?

A. After you get all through it is around 6%, Judge.

Q. As a matter of fact the interest rate is 4½%, is it not?

A. That is your base rate, but at the end of the year after you have paid the premiums and other factors it will cost you over 6%.

(Testimony of Charles Campbell Crozier.)

Q. Correct, but the mortgage produces 4½% interest? A. The base rate is 4½%.

Q. And these other items that you referred to are incidental expenses that the mortgagor assumes?

A. Figures in complying with all the necessary red tape.

Q. In order to get the 4½% interest?

A. In order to pay the 4½% interest.

Q. Now then, these incidental expenses you referred to include fire insurance premiums, don't they? [508] A. That is correct.

Q. And includes a covenant on the mortgagor's part that he will pay the taxes?

A. That is also in addition to the amount that the mortgagor shall pay into the mortgagee monthly.

Q. Those items are the ordinary incidental expenses that accrue to other property owners, are they not? A. Correct.

Q. He has to pay fire insurance premiums, has to pay the taxes and whatever incidental expenses may attach to his property?

A. That is correct.

Q. When you come down to the interest yield on these mortgages the rate is 4½%?

A. That is your base rate of interest, Judge.

Q. Now in connection with the earning power of money, you stated yesterday you followed the local loan market, is that correct?

A. That is correct, Judge.

(Testimony of Charles Campbell Crozier.)

Q. In that event you know that no local bonds bearing 4% interest can be purchased at par, do you not?

A. That is correct, except possibly the more hazardous ones, not your prime bonds.

Q. Are there any hazardous local bonds on the market,—I am not talking about mainland bonds?

Mr. Courtney: If the Court please, I submit that is immaterial, why do we have to go into the bond market, we are dealing with real estate.

Judge Robertson: Yes, but I am cross examining on statements made by the witness on dieret yesterday.

Q. In other words, to buy a reasonable safe local 4% [509] bond you would have to pay 105 or 107 premium.

A. Yes on the prime bonds that pay 4% you have to pay a premium.

The Court: I assume you will be with this witness some time. We will take a recess now.

(Recess: 10:30 to 10:40 o'clock a.m.)

Continuation of Cross Examination of

MR. CHARLES CAMPBELL CROZIER

Questions by Judge Robertson:

Q. Mr. Crozier, I think you stated that the McGrew Estate owns an area somewhere between 75 to 100 acres of land?

(Testimony of Charles Campbell Crozier.)

A. That is correct, Judge, known as McGrew Point.

Q. And a large part of that is occupied by what is known as the Cooper Homestead?

A. The greater portion is in the homestead area.

Q. The portion that they put on the market is situated mauka of the road, is it not, the Cooper Homestead premises being makai of the road?

A. That is correct.

Q. Having the water frontage?

A. That is correct.

Q. Do you know how much of the area mauka of the road they put on the market?

A. They subdivided I believe somewhere in the neighborhood of about ten acres, Judge, some 45 lots I believe.

Q. And they have all been sold, have they not?

A. That is correct, Judge.

Q. Do you know the price paid per square foot?

Mr. Courtney: That is objected to as incompetent.

The Court: Overruled. [510]

A. The front lots on Kamehameha Highway sold for 25¢ a square foot, the rear lots, residential lots sold for 15¢ a square foot. There were a few lots that had bad holes in them that I think they discounted; there were two or three undesirable lots in the tract that sold for less.

Q. Undesirable for what reason?

(Testimony of Charles Campbell Crozier.)

A. Ground conditions, topography, being boggy, a swale in them, gulch.

Q. Now you spoke of the Bishop Estate owning some land or lands up there?

A. They own the land of Waiaa.

Q. That land is under lease, is it not?

A. It is.

Q. To the Plantation?

A. Plantation, yes sir.

Q. Do you know that that is a long lease?

A. That is a long lease, Judge, but I understand there is a new lease dated 1940 that has certain withdrawal clauses of certain areas that they can withdraw.

Q. That withdrawal clause refers to that portion of the land that has certain water rights, isn't that so?

A. One or two small areas leading into Pearl City that are now in cane leased by the contractor Fujimi. That undoubtedly will be withdrawn because the plantation cannot continue to raise cane on the small area and cross the road, it is just a small piece.

Q. That would be up to the trustees of the Estate, wouldn't it?

A. I understand the terms of the lease provide for all [511] of that area.

Q. Don't you know that that land has certain water rights attached to it?

(Testimony of Charles Campbell Crozier.)

A. Yes I believe these ahupuaas have water rights.

Q. Don't you know that was the reason for the withdrawal clause, the water rights?

A. One of the reasons, yes Judge.

Q. The Bishop Estate leased those areas that you have reference to now in July, 1940 for a term of 25 years, isn't that so?

A. 25-1/2 years I believe, yes.

Q. Now you have referred to the McCandless Estate as being the owner of some lands there, what land is that?

A. The lands of Kalawao, that is as you go out the highway McCandless had a small cattle pen on the mauka side of the road; it is that land that used to be in rice, as you go out the highway after leaving Aiea.

Q. This Kalawao that the McCandless Estate owned is beyond Aiea, isn't it?

A. It is half way between Aiea and Pearl City.

Q. And you know that the Honolulu Plantation Company holds a lease of that area?

A. Yes, but some of the areas are still not leased and are occupied by the McCandless Estate.

Q. For cattle?

A. Yes, and some sub-tenants on the left side of the road for piggeries.

Q. You mentioned some land beyond Aiea?

A. Yes.

Q. What land is that?

(Testimony of Charles Campbell Crozier.)

A. That is the land after you cross Waimalo Stream [512] going right in where the Taro Products Building is.

Q. That is on the West side of Kalawao?

A. Yes, that is correct.

Q. In other words, still farther away from Moanalua? A. That is correct.

Q. Do you know whether the Austin Estate also leases their land to the Plantation?

A. All of the Austin Estate is leased to the Plantation at present.

Q. That is the Honolulu Plantation?

A. Honolulu plantation, Judge.

Q. The McCandless land at Kalawao, other than what is leased to the Honolulu Plantation Company, what is the character of that land?

A. The majority is wet land, Judge, and a fish pond on the bay.

Q. Fish pond, and when you say the area is wet land, you have in mind swamps?

A. Formerly in rice, Judge, now it has gone to what we term swamps.

Q. In other words, abandoned rice fields now in swamps?

A. That is correct, Judge, there is a small area here and there, kula land or dry land, but they are in the minority.

Q. Scattered pieces? A. Yes sir.

Judge Robertson: I think that is all, Your Honor.

Mr. Courtney: That will be all with the witness.

Before the Government rests, I desire to make a motion: I move to strike the testimony of the witnesses Russell, Castro, Harrison and Kearns, on the ground that the evidence [513] which they gave is incompetent, not proof of market value; on the grounds that it has no probative weight or consideration, and is not entitled to consideration in this case; that it does not tend to prove or disprove the issue of market value; it is contrary to the recognized authorities in this country. In support of that motion, rather than adopting my own opinion I will cite a recognized authority, Nichols on Eminent Domain, Volume 2, Page 1170, with authorities annotated and quoted. Quote "As bearing upon these issues the owner may offer a plan showing a possible scheme of development for the purpose for which it is most available (and the cases are cited), but he cannot go further and describe in detail to a jury a speculative enterprise for which in his opinion or that of some expert the land might be used, and base his estimate of value upon the profits which he would expect to derive from the enterprise. The owner cannot for example introduce evidence of the return that he would derive from cutting up a vacant tract of land into building lots, since this would involve pure conjecture as to how fast the lots would be sold and the price that each would bring, (and the cases are cited), and the details of a possible improvement, and its value, (and the cases are cited), or the expected profits, (and the cases are cited) or rentals (and the cases

are cited) after such improvement was completed are equally inadmissible for the same reason. The trial court cannot be too careful in excluding evidence of this character, as witnesses can always be found who will, in their imagination, cover the most hopelessly unmarketable vacant land in the neighborhood of a large city with apartment houses filled with desirable tenants, and, with the [514] aid of a little figuring, capitalize the prospective net income at ten times the actual value of the land." Unquote. And I could not paraphrase that any more completely than Mr. Nichols has. I, therefore, move that the testimony of these witnesses based upon the capitalization of income, which is based upon an alleged subdivision, which is based on speculation and conjecture and the adoption of a rule which is not in existence with respect to this property based on the authorities, I move that the testimony of these witnesses should be stricken from the record.

The Court: The motion is overruled.

Mr. Courtney: Before resting, I now offer a motion for a directed verdict in each case, a copy of which I hand to opposing counsel.

The Court: The same in both cases?

Mr. Courtney: Yes, Your Honor. Will the Court kindly note an exception in each instance.

The Court: Both motions overruled.

Mr. Courtney: With the exceptions, Your Honor.

The Court: Exceptions noted in the record.

Mr. Courtney: I understand Your Honor's ruling covers both the motion to strike the testimony as well as the motions for a directed verdict.

The Court: It does.

Mr. Courtney: The government rests.

The Court: Do you have any sur-rebuttal, Judge?

Judge Robertson: No, Your Honor, in view of the admissions made by Mr. Crozier on cross-examination I do not need to call any further witnesses. We rest.

(Thereupon at 10:55 o'clock a.m., both parties rested.) [515]

The Court: Counsel ready with their request for instructions?

Mr. Courtney: The Government is ready.

Judge Robertson: Yes, Your Honor.

The Court: Until we get the instructions settled, which would undoubtedly require a longer period of time than until 12:30, there is nothing for the jury to do but to remember the testimony that you have heard and the other evidence, so that I think it would be well to excuse the jury until 9:00 o'clock tomorrow morning. Is counsel in agreement to that?

Judge Robertson: That seems to be the proper thing to do.

Mr. Courtney: Agreeable, Your Honor.

The Court: The jury then is excused until 9:00 o'clock tomorrow morning. We will hear the argument by counsel at that time, following which the instructions will be given to the jury and then the

case will go to you for your deliberation. Adjourned until 9:00 o'clock tomorrow morning.

(Adjourned: 10:57 o'clock a.m.)

(On Thursday, the 30th day of July, 1941, at the hour of 9:12 o'clock a.m., all parties being present in the courtroom, the following further proceedings were had:)

The Clerk: Civil Nos. 434 and 436. Cases called for further trial.

The Court: The jurymen are all in their seats. Are you ready to proceed with the argument?

Mr. Courtney: I am. [516]

The Court: I think before you make your argument that this is a proper time to pass those small maps to the jurymen.

Mr. Courtney: I will do that, Your Honor; they have all been marked by the Clerk.

The Court: Have you enough to go around?

Mr. Courtney: Yes, and one extra.

(Thereupon Mr. Courtney handed to the jurors the small facsimile maps, being copy of Government's Exhibit "A", and marked Government's Exhibit "F").

At 9:13 o'clock a.m. Mr. Courtney commenced his opening argument to the jury.

The Court: I think the jury is entitled to a recess before Judge Robertson proceeds with his argument. We will take a short recess.

(Recess: 9:45 o'clock a.m. to 10:10 a.m.)

Argument by Judge Robertson.

The Court: (At the close of Judge Robertson's argument). Mr. Courtney, do you care to estimate how long you will be on your closing argument?

Mr. Courtney: Not to exceed ten or fifteen minutes.

The Court: We will take a recess first.

(Recess: 11:35 to 11:45 o'clock a.m.)

Closing argument by Mr. Courtney.

The Court: Gentlemen of the jury, it is now 12:00 o'clock. If the Court recesses you until 1:00 o'clock will it be convenient for you to get your lunches in the meantime and be back here by 1:00 o'clock?

Jury: Yes sir.

The Court: Excused until 1:00 o'clock.

(Recessed: 12:00 o'clock M.) [517]

At 1:05 o'clock p.m., all the parties being present in the courtroom, the following further proceedings were had:

The Court: The jury are all present. By agreement of the parties, you have been trying two separate cases: one known as Civil No. 434, which is a condemnation by the Federal Works Agency for Army housing facilities of 77.288 acres; the other the condemnation of two parcels of land known as

Civil No. 436, one parcel "A" consisting of 61.512 acres and parcel "B" consisting of 192.952 acres. These properties adjoin one another and are owned by the same persons. They have, therefore, been tried as one case. But in deciding this case you must render a separate verdict for the property appropriated as Civil No. 434, and another verdict for the property appropriated as Civil 436.

This is a taking or a condemnation suit by the United States Government and under the provisions of the Fifth Amendment to the Constitution, the United States is required to pay just compensation for the property appropriated. That is the purpose of your being called upon as jurors to sit in this case to determine what that just compensation is. Just compensation is the fair cash market value of the property at the time of the condemnation. In this instance, one condemnation was commenced on November 20, 1940, the other on November 27, 1940, but the parties have, by agreement in the record, stipulated that the fair market value for both suits should be considered as the fair and reasonable market value as of November, 1940, without relation to the small difference in time. [518]

If in the course of this trial this Court has by word or expression appeared to favor one side or the other, it was not so intended. It is the duty of the Court and the duty of the jury to do absolute, equal and fearless justice to both the land owners and the Government. You are to take the law from the Court and to confine yourselves solely to a con-

sideration of the testimony produced in this case in arriving at a verdict, without limiting your consideration to any isolated portion of such testimony, by considering it as a whole, fairly weighing all of the testimony and all of the evidence. You must not decide this case upon any knowledge which may have come to you by any of the avenues of information which sometimes reach jurors, nor by any outside comment, suggestion or influence. Such information and conversation, however innocently given, accomplishes a dishonest result and the highest degree of honesty and fearlessness is required of you under your oaths in acting as jurors in any case.

One of the rights of the sovereign, that is the government of any nation, is to appropriate the property of individual citizens for the public use of all. In the United States every person holds land subject to condemnation by the Government for public use whenever the necessities of the people shall require them. But in the United States, unlike some other places in the world, under its Constitution, the Government must pay to the person whose property is condemned just compensation therefor. [519]

Just compensation as I have defined it elsewhere in these instructions means the fair reasonable cash market value of the property at the time of the condemnation, because it is this fair cash market value which is taken from the individual for the use of the people. The United States brings this suit as a petitioner for the purpose of determining

that fair cash market value. But that fact is not to influence you in any way. The Government is entitled to and asks the same consideration from you as any other litigant, neither more nor less. Each person coming into the courtroom as a litigant is equal in the eyes of the law. But on the other hand the United States must not be penalized because it brings this suit. Nor must it be required to pay a premium over *the* above the fair cash market value of this property because of the fact that it has condemned land for public use, nor because of any unwillingness on the part of the owner to give up his property for public use. The determination of value which you are to make in this case, is not to be measured by the necessities of the public nor the unwillingness of the owner to part with his property, but is to be determined solely and only by a determination from all the evidence of a fair cash market value as I have defined that term to you.

You are instructed that the judicial ascertainment of the amount that shall be paid to the owner of private property taken by the Government for public use under the power of eminent domain is always a matter of importance, for in any society the fullness and sufficiency of the security which surrounds the owner in the use of his [520] property constitutes one of the most certain tests of the character and value of the government.

When property is taken in this manner the owner becomes entitled to receive the full and exact equivalent of it in money. He is entitled to be put

in as good a position pecuniarily as if his property had not been taken. When he has received a full and fair cash market value of his property he has been put in as good a position pecuniarily as if his property had not been taken.

The just compensation which the owner is entitled to receive includes all elements of value that inhere in the property, but it does not exceed the market value fairly determined. The amount required to be paid to the owners does not necessarily depend upon the use to which they have devoted the land, but is to be arrived at upon a just consideration of all the uses for which you find the evidence to show the land is suitable. In this connection you may take into consideration any evidence which indicates the best and most profitable use to which the land is adapted and can probably be put in the reasonably near future.

The highest and best use for which the property is adaptable or likely to be needed in the reasonably near future, so far as shown by the evidence in this case, is properly to be considered by you, not necessarily as the exact measure of compensation to be paid for the property, but to the full extent that the prospect of demand for such use affected the market value of the property while held in private ownership in November, 1940.

You are instructed that market value is not to be [521] determined by what the property would bring at a forced sale where the owner was compelled to part with it without consideration as to whether

or not anybody desired to purchase it. The term "market value" is equivalent to "cash value". It means the value which a willing purchaser would pay to a willing seller of the property at the time of the taking, paid in money, taking into consideration all of the uses to which the land was adapted and for which it was reasonably capable.

In other words, the fair value of the property as between one who wants to purchase and one who wants to sell at a sale which a prudent owner would make if at liberty to fix the time and condition of sale.

I charge you that in determining what the fair market value of this property is, you are to consider that price which a willing purchaser would pay to a willing seller, neither being under any compulsion and each being able to carry out the bargain. You are to consider the present use of the property. You will also consider potential uses, if you find that those potential uses would occur in the reasonably near future and because of that fact would impel a purchaser and a seller, in a free sale, to arrive at a different price from that based on the present use of the property. You are not to consider any prospective future profits depending upon future contingencies. You will view this case in the light of your experience as men of affairs and arrive at a valuation based upon the evidence in the case, which in your opinion would represent a fair cash market value of this property

tested by the rule of good common sense, hard-headed and [522] sound business judgment. The market value of these properties must not increase simply because of a condemnation suit. It is the fair cash market value of the property which is taken from these defendants. That and nothing more is what the Government must pay.

In this case there has been some testimony on the part of the land owners of their future plans with respect to this property. You are not to consider the personal plans of the owner except insofar as they tend to show adaptability of the lands to their highest, best and most profitable use in the reasonably near future.

In this case it is admitted without dispute in the testimony that the lands condemned are a part of a holding in the immediate vicinity, owned by the same respondents. In deciding this case, you are not to assume any particular type or policy or management on the part of the trustees with respect to the remainder of said lands. The very theory and hypothesis upon which this case is being tried is the assumption of a free and open market, of a willing purchaser and a willing buyer in a free transaction. In considering this case, therefore, you are not bound to assume that the Trustees of the Damon Estate would not release any of the lands in the immediate vicinity from their present status.

In determining by your verdict what amount of money to be paid to the owners would be the full equivalent of the property taken, you should take

into consideration the earning power of money as you may find it to be from the evidence in this case.

It is common knowledge that one of the most important [523] factors in determining the value of property is the income which it produces. And although it is market value which you are to consider in these cases, nevertheless the investment of the proceeds by the owner is one of the elements to be considered in determining market value, because that is an element which naturally would be taken into consideration in any bargaining between an owner willing to sell and a purchaser willing to buy.

In this proceeding the Honolulu Plantation Company, the lessee of the Damon Estate, is not making a claim for any leasehold interest in the land. The Trustees of the Damon Estate are, therefore, entitled to the full amount of compensation to be paid for the taking of the land without any deduction by reason of the fact that at the time of the taking the land was subject to the lease.

In this case the Court has permitted you to receive the testimony of certain witnesses who, because of their business and experience, are termed "experts". The law receives this evidence because these experts sometimes aid in determining questions of value. But I charge you that the ultimate weight you may give to the testimony of such witnesses is for you to determine. There is no rule of law which requires you to surrender your own judgment to any person testifying as an expert witness.

In other words, the testimony of an expert, like that of any other witness, is to be received by you and given such weight as you think it is properly entitled to. But I charge you that you are not bound or concluded by the testimony of any such witness, expert or other. Such testimony is merely the opinion of the particular witness and should be [524] considered in the light of all the evidence. You should consider the opportunity of such persons to know the values for which they contend. You should weigh the reasonableness or unreasonableness of their estimate of such value as demonstrated in their testimony. You should apply this to your own sound judgment and good sense in arriving at the fair and reasonable market value of this property in the light of all the evidence. If you believe from the testimony in this case of any witness, that that witness has magnified, exaggerated or overestimated the fair market value to which he has testified, because of his interest in this suit, or his prejudice, or his want of knowledge or experience, or his untruthfulness, or his opportunity for or lack of opportunity of knowing the things about which he testifies, or for any other reason, then it is your duty to disregard the evidence of such witness insofar as it has unjustly magnified, increased or overestimated the value of the land to be taken.

Whether the testimony of expert witnesses is to be considered strong or weak depends largely upon the skill and character of the respective witnesses, their knowledge, experience and opportunities for

acquiring information, and all attendant facts and circumstances, including the reasons, if any, which were given by the witnesses for their respective opinions.

By order of this Court, and with the consent of the parties, you went upon the lands involved in these cases and viewed them in order that you might understand and apply the evidence from seeing the lay of the land, its location and character, and you are instructed that since the testimony as to the value of the lands and the compen- [525] sation to be paid for the taking of them is conflicting, you may resort to your own knowledge including what you have seen on your visit to the locality concerning the elements which affect the value and compensation, in order to determine the relative weight to be given the conflicting testimony.

You, gentlemen of the jury, are the exclusive judges of the credibility of the witnesses who have testified before you, and of the weight to be given to their testimony. Your verdict should be based upon the preponderance of the evidence. This does not necessarily mean the greater number of witnesses. It means the greater weight and value of the testimony which has been adduced as you find it to be. If you find from the evidence that the lands in question were in November, 1940 worth not more than the Government contends, then it is your duty to, and I instruct you, to return a verdict in the following sums: For Civil No. 434, 77.288 acres,

the sum of $33,498.00; For Civil No. 436, 254.468 acres, the sum of $103,989.00.

The Court instructs you that in the decision of these cases you are to refrain from entering into what is known as a "Quotient Verdict". Such a practice is to be condemned. A quotient verdict arises in a situation where each member of the jury writes down a figure and such twelve figures are added together and then divided by twelve. The mere mention of this practice demonstrates very clearly that the figure which is arrived at does not represent the considered judgment of the jury on what the fair market value of the property is.

Now the Clerk will turn over to you all of the Exhibits. [526] The instructions will not be turned over to you unless there should be a definite, special request for the instructions or some part of them by the jury. It has been found not to be the best practice to give over to the jury a voluminous set of instructions which may contain many alterations, modifications and changes and other notations on them. I want you to feel you are acquainted with the instructions; if you did not get them, or any part of them, clear enough from the reading, if you will point that out, that part or all of the instructions may be read over to you again. Instructions are to be considered taken as a whole, no particular part of the instructions, of the group of instructions, is controlling and should not stand out in your mind as a sole guiding star; consider them upon the whole. They have been requested, at least

in substance, by the contending parties and the Court has found that they are applicable as sound rules and principles of law to the case in trial.

Now there will be the first duly of the jury, the first duty of the jury will be to select from your numbers a foreman, who will have charge of the balloting, if there is any, the count of the ballots, and generally to preside over your jury deliberations and then to sign and date the verdict which you are to render to the Court. There will be two verdicts, one as to case 434, one as to case 436. I think that is all the Court needs to say to you, gentlemen of the jury.

Mr. Courtney: I desire, in accordance with the local practise, to note an exception to the giving of defendant's instructions number 7, 8, 9, and 11 as amended, and of the refusal of the Court to give Government's instructions 1, [527] 2, 3, and 6, and the refusal of the Court to give certain portions of requested instructions 7 and 9.

Judge Robertson: The respondent's desire to except to the giving of Government's requested instruction No. 7 as modified, and No. 9 as modified, and to the refusal of the Court to give respondent's requested instruction No. 6, and in the Court's modifying respondent's requested instruction No. 11.

The Court: All right. Gentlemen, you may retire under the custody of the Marshall and his deputy. Mr. Clerk, swear the Marshal and his deputy as custodians of this particular jury.

(Thereupon the Marshal and his deputy were by the Clerk duly sworn.)

The Court: Mr. Marshal, pass these forms of verdict of the jury.

(Whereupon the Marshal handed the forms of verdict to the jury.)

(At 1:30 o'clock p. m., the jury retired to the jury room for its deliberations.)

At 10:13 o'clock p. m., all parties being present in the courtroom the following further proceedings were had: The Court directed the Clerk to notify the Marshal to bring the jury into the courtroom; whereupon the jury returned to the courtroom in charge of the Marshal.

The Court: The jury are all present in the box. Gentlemen of the jury, who is your foreman?

Juror Oleson: I am, sir.

The Court: I take it you haven't arrived at a verdict as yet?

Foreman of the Jury: No, Your Honor. [528]

The Court: Does there appear to be a reasonable prospect of arriving at a verdict shortly?

Foreman of the Jury: That is a very difficult question to answer, Your Honor.

The Court: The Court will direct the Marshal to allow you to go back to the jury room and continue your deliberations until about 11:00 o'clock, and if you haven't arrived at a verdict by then the Marshal will make arrangements for some accommodations to sleep for the night, so that you can

continue tomorrow morning. The Court is, of course, desirous to have a verdict in the case, a duly considered verdict. I do not want anyone to feel that they should, by way of compromise or otherwise, relinquish their honest view about the matter that is before the jury for its consideration, but at the same time I charge you to weigh carefully the opinions of each other and consider the reasons they are based upon and do your best to reconcile your differences according to your consciences and judgments, and see if possibly you cannot arrive at a unanimous verdict that is satisfactory to each and all of you. Of course, it must be a unanimous verdict. The hour was getting along so I thought it proper to call you down and make inquiry as to what progress you were making. You may now go back to the jury room and continue your deliberations with the hope and trust of the Court that you will be able to iron out your differences and arrive at a verdict.

Juror: With permission of our Foreman, would you might refresh my memory, I speak for myself, on your instructions to us with regard to the value of the [529] properties within a restricted period.

The Court: If I could understand what you mean I will be glad to give you any aid and enlightenment I can as to the instructions, but I don't quite get the meaning of that.

Juror: As I recall, we were instructed not to consider the value of this land, or those lands, too far into the future, and more or less confine our-

selves to a period of time within a reasonable time for the development of this land.

The Court: The potential uses within a reasonably near time,—give me those instructions (Thereupon the Clerk hands the instructions to the Court), —I will read that. Of course, it is referred to in other places in the instructions as to the adaptability,—one of the things you can considerer is the adaptability of the land to the highest, best and most profitable use in the reasonably near future. Now, so far as I can gather from your question——

Mr. Courtney: May I suggest it might be Government's No. 7.

Judge Robertson: I would suggest that it is our No. 3, Your Honor.

Juror: Read them both.

The Court: One of the instructions which was referred to by counsel reads as follows: "I charge you that in determining what the fair market value of this property is, you are to consider that price which a willing purchaser would pay to a willing seller, neither being under any compulsion, and each being able to carry out the bargain. [530] You are to consider the present use of the property. You will also consider potential uses, if you find that those potential uses would occur in the reasonably near future and because of that fact would impel a purchaser and a seller, in a free sale, to arrive at a different price from that based on the present use of the property. You are not to consider any prospective future profits depending upon future

contingencies. You will view this case in the light of your experience as men of affairs and arrive at a valuation based upon the evidence in the case, which in your opinion would represent a fair cash market value of this property tested by the rule of good common sense, hardheaded and sound business judgment. The market value of these properties must not increase simply because of a condemnation suit. It is the fair cash market value of the property which is taken from these defendants. That and nothing more is what the Government must pay." The other instruction referred to is this: "The just compensation which the owner is entitled to receive includes all elements of value that inhere in the property, but it does not exceed the market value fairly determined. The amount required to be paid to the owners does not necessarily depend upon the use to which they have devoted the land, but is to be arrived at upon a just consideration of all the uses for which you find the evidence to show the land is suitable. In this connection you may take into consideration any evidence which indicates the best and most profitable use to which the land is adapted and can probably be put in the reasonably near future. The highest and best use for which the [531] property is adaptable or likely to be needed in the reasonable near future, so far as shown by the evidence in this case, is properly to be considered by you, not necessarily as the exact measure of compensation to be paid for the property, but to the full extent that the prospect of demand for such use affected the mar-

ket value of the property while held in privat ownership in November, 1940." Those two instruc tions I think cover your question.

Juror: That is right.

Foreman of the Jury: Some of the jurors real izing they are keeping the Court and counsel up however would like to have that 11:00 o'clock ex tended to 11:30 in the hope we might settle i tonight.

The Court: Very well, and if you want to ex tend that even a little later I authorize the Marsha to abide by your express disposition in that matte

Foreman of the Jury: Thank you, Your Hono

(Thereupon at 11:25 o'clock p. m., the jury agai returned to the jury room to resume its delibe ations.)

At 11:30 o'clock p. m. the Court directed th Clerk to notify the Marshal to bring the jury int the courtroom, whereupon the jury returned to th courtroom in charge of the Marshal.

The Court: Gentlemen, I regret the necessity o holding you over night, but it is very importan that we exhaust every reasonable effort to have verdict arrived at. The Marshal has arranged fo overnight accommodations at the Moana Hotel wit breakfast for the jury at 7:00 o'clock tomorro morning, and he will take you out there. [532 Keep together and make it as easy as possible fo the Marshal to fulfill his obligations and duty. I any of you want to communicate by telephone t your homes you had better do that here before yo

go out to the hotel, as I would like to have you go directly to your rooms when you get there. The rooms are assigned. And keep in mind the solemnity and importance of the service you have to perform. Your obligations have no connection with anyone other than yourself, and come back in the morning then and go about your further deliberations and see if you cannot arrive at a fair and proper verdict.

Juror: I would like to ask a question as to whether or not we could be permitted to return to our homes instead of going to the hotel. That would be a convenience to myself and family and I am sure to others.

The Court: I quite understand that and would personally be very much in accord with that idea, but it is too well established and ingrained in the law that a jury once a case is submitted to them are not to disband or go about any other business or go any place separately; they must be kept together. The rules now are not nearly as strict now as they were many years ago; a time was, well within modern history, when the jury was locked up and given nothing but bread and water to subsist on until they had arrived at a verdict. That is not the practice today, but the Court cannot waive the rules that serve the matter of the custodianship after the case has been given to them. I am sorry.

(Thereupon at 11:40 o'clock p. m., the jury left for the Moana Hotel in charge of the Marshal and his deputy.) [533]

At the hour of 11:08 a. m., Thursday, the 31st day of July, 1941, the jury returned to the court-room, all the parties being present.

The Court: Mr. Foreman, has the jury arrived at a verdict?

Foreman of the Jury: They have, Your Honor.

The Court: Pass it to the Clerk.

(Thereupon the Foreman of the Jury handed to the Clerk the Verdict.)

The Court: Mr. Clerk, read the Verdicts of the Jury.

The Clerk reading the Verdicts as follows:

"In the United States District Court
for the Territory of Hawaii

Civil No. 436

The United States of America,

Petitioner,

versus

254.468 Acres of Land, etc.,

Defendants.

VERDICT

We, the jury in the above entitled cause, find the fair market value of the land condemned herein, exclusive of crops and improvements, to be in the sum of $203,574.40.

Dated, Honolulu, T. H. this 31st day of July, 1941.

(Signed) DAVID L. OLESON,
Foreman."

Civil No. 434

"The United States of America,

Petitioner,

versus

Certain Parcels of Land on the Island of Oahu, etc.,

Defendants.

VERDICT

We, the jury in the above entitled cause, find the [534] fair market value of the land condemned herein, exclusive of crops and improvements, to be the sum of $61,830.40.

Dated at Honolulu, T. H., this 31st day of July, 1941.

(Signed) DAVID L. OLESON,
Foreman."

The Court: That, of course, is the unanimous verdict of the jury.

Foreman of the Jury: It is, Your Honor.

The Court: The Court thanks the jury for their services in this case. I am sorry that you had the difficulties you had, but that is not an unusual or unreasonable thing at all. I don't know when the jury will be called again, we haven't any case set for trial at the present time, but you will be called by the officers of the Court when your services are again required.

Judge Robertson: I also wish to thank the jury for their patient attention in this matter, and on behalf of the respondent we except to the Verdicts as being contrary to the law and the evidence and the weight of the evidence and give notice of motion for a new trial.

Mr. Courtney: I desire to thank the jury for their patient consideration and for their courtesy. I have also to say that I am sorry that the verdict in this case was not more closely approaching the Government's appraisal. That, however, has no bearing whatsoever on what you have done, that was your verdict, and it is an American citizens' verdict,—that is all we want. We would like to be a little more right in our appraisals, but I want to state that it is the duty of the Government and it is the [535] desire of the Government to give the full and fair measure of compensation. That is what the Government holds and that is what the Government will pay, so while it is disappointing that has nothing to do with the case, and I do thank you for your attention and I do appreciate your personal courtesy. I know your deliberations were sound and well considered.

The Court: The jury is excused without date, that means until you are called again.

(Thereupon at 11:14 o'clock a.m., the jury left the courtroom.)

Mr. Courtney: If the Court please, I understand that the local practise is, like Judge Robertson has done, that we give notice of motion for a new trial

at this time and possible appeal in both cases, and I desire to do so now in order to protect the record on that score, and I hereby give notice of motion for a new trial and appeal in both cases.

Judge Robertson: I want the record to show that counsel did not speak until after the jury had retired.

The Court: I was just going to ask if you waived any objection to that. I am sorry, I am inclined to think——

Mr. Courtney: I am not precluded from appealing from the judgment. I am concerned only now with the motion for the new trial.

The Court: I did not understand the motion for a new trial, the notice need not be given in the presence of the jury.

(Adjourned: 11:15 o'clock a.m.) [536]

CERTIFICATE

I hereby certify the foregoing to be a full, true and accurate transcript of my shorthand notes taken in the above entitled causes except as to the arguments of counsel.

(Signed) ANNE R. WHITMORE
Reporter. [537]

[Title of District Court and Cause—Consolidated.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing pages numbered 1 to 537 inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above-entitled causes, as the same remains of record and on file in my office, and I further testify that the costs of the foregoing transcript of record are $244.55 and that said amount has been charged by me in my account against the United States. [538]

In witness whereof, I have hereto set my hand and affixed the seal of said court this 19th day of March, A. D. 1942.

WM. F. THOMPSON, JR.,
Clerk,
United States District Court,
Territory of Hawaii.

[Endorsed]: Filed Aug. 11, 1941. [539]

[Endorsed]: No. 10104. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, et al., Appellees, and United States of America, Appellant, vs. John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, et al., Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Hawaii.

Filed March 31, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

U. S. Naval Communication Service

SRS

Confirmation

326 NPM KNMX5Feb

ZPN1 Rdo Hono Ck 81 Govt Court Fifth 33

Govt Court OBrien Clerk Ninth Circuit Court Appeals San Fran.

Government filed Notice of Appeal on November fifteen and designation record on appeal today in Civil Numbers Four Three Four and Four Three Six United States versus Certain Lands and Trus-

tees Damon Estate comma Consolidated for purposes of appeal period Impossible docket (5) appeal record with you within time limit which expires February Twelve request your Court grant enlargement sixty days from February Twelve please advise by radio.

Thompson Clerk US District Court Hawaii
935
MA 2500
P O Box 540
Paul P. O'Brien
H705 1705 Gd

United States Circuit Court of Appeals
for the Ninth Circuit

Undocketed
(DC Hawaii Nos. 434, 436)
#10104

UNITED STATES OF AMERICA,
Appellant,

vs.

CERTAIN LANDS AND TRUSTEES, DAMON ESTATE,
Appellees.

ORDER EXTENDING TIME TO FILE RECORD

Upon consideration of the telegraphic application of Mr. Wm. F. Thompson, Jr., clerk of the District

Court of the United States for the Territory of Hawaii, and good cause therefor appearing, it is ordered that the time within which appellant may file consolidated record on appeals and docket above cause in this court be, and hereby is extended to and including April 14, 1942.

CURTIS D. WILBUR
Senior United States Circuit Judge.

Dated: San Francisco, Calif., February 6, 1942.

Filed Feb. 6, 1942. Paul P. O'Brien, Clerk.

Re-filed Mar. 31, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

MOTION

The appellant, United States of America, moves this Court for an order authorizing the consideration of the exhibits received in evidence, even though said exhibits are not included in the printed record, such consideration to be the same as if said exhibits had been designated for inclusion in the printed record.

This motion is made for the reason that most of said exhibits are maps or photographs which it would be unreasonably expensive to reproduce in the printed record. Such exhibits may, however, be

necessary for the full and proper consideration of the questions involved.

UNITED STATES OF AMERICA
By: NORMAN M. LITTELL
Assistant Attorney General

Service of the within Appellant's Motion and receipt of a copy thereof is acknowledged this 17th day of April, 1942.

ROBERTSON, CASTLE & ANTHONY
Attorneys for John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased.
By A. G. M. ROBERTSON,
for the foregoing attorneys.

[Endorsed]: Filed Apr. 6, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER

Upon consideration of the motion filed by the appellant for an order authorizing consideration of the exhibits, and good cause appearing therefor, it is hereby ordered that said exhibits shall be used and considered by this Court upon said appeal, notwithstanding the provisions of Rule 19 of the Rules of this Court, with the same force and effect as

though same were incorporated in and made a part of the printed transcript of record.

FRANCIS A. GARRECHT
Circuit Judge

Service of the within draft form of order and receipt of a copy thereof is acknowledged this 17th day of April, 1942.

ROBERTSON, CASTLE & ANTHONY,
Attorneys for John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased.

By A. G. M. ROBERTSON,
for the foregoing attorneys.

[Endorsed]: Filed Apr. 6, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD TO BE PRINTED AS RECORD ON APPEAL

To the Clerk of the Circuit Court of Appeals for the Ninth Circuit:

The United States of America, appellant above named, hereby designates the following parts of the record, proceedings and evidence for printing the

record on appeal in conformity with Rule 19(c) of this Court. For convenience of reference the two cases are referred to as "No. 434" and "No. 436" respectively. For the same reason, parts of the record as to matters arising after the cases were consolidated are treated together.

		Filed
1.	Case No. 434	
	A. Petition	November 20, 1940
	B. Declaration of taking	November 20, 1940
	C. Order and judgment on declaration of taking	November 20, 1940
	D. Answer of Trustees under Will of Samuel H. Damon, deceased	December 10, 1940
	E. Answer of Bishop National Bank	December 30, 1940
	F. Motion for Order of Payment of Deposit and Notice filed by Trustees of Damon estate	April 8, 1941
	G. Order for Distribution of Deposit	April 15, 1941
2.	Case No. 436	
	A. Petition	November 27, 1940
	B. Declaration of taking	November 27, 1940
	C. Order and judgment on declaration of taking	November 27, 1940
	D. Answer of Trustees under Will of Samuel H. Damon, deceased	December 10, 1940
	E. Motion for Order of Payment of Deposit and Notice filed by Trustees of Damon estate	April 8, 1941
	F. Order for Distribution of Deposit	April 15, 1941

3. Cases Nos. 434 and 436

A.	Transcript of Proceedings had and Evidence Adduced at the trial	July 31, 1941
B.	Government's requested charges.	
C.	Defendants' requested charges.	
D.	Motions for Directed Verdicts	July 29, 1941
E.	Verdicts	July 31, 1941
F.	Orders for Judgments	August 18, 1941
G.	Judgments	November 15, 1941
H.	Notices of Appeal	November 15, 1941
I.	Orders enlarging time	November 15, 1941
J.	Orders enlarging time for serving and filing designations of record on appeal	November 15, 1941
K.	Stipulation and agreement for consolidation	February 2, 1942
L.	Order consolidating causes on appeal	February 3, 1942
M.	Order for transmittal of original exhibits	February 4, 1942
N.	Appellant's designation of record on appeal	February 4, 1942
O.	Order of this Court extending time to docket record on appeal.	
P.	Order of this Court permitting consideration of original exhibits.	
Q.	Appellant's statement of points to be relied upon.	
R.	This designation.	

UNITED STATES OF AMERICA
By NORMAN M. LITTELL
Assistant Attorney General

Service of the within Appellant's Designation of Parts of Record to be Printed as Record on Appeal and receipt of a copy thereof is acknowledged this 17th day of April, 1942.

ROBERTSON, CASTLE & ANTHONY
Attorneys for John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased.

By A. G. M. ROBERTSON,
for the foregoing attorneys.

[Endorsed]: Filed Apr. 23, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S STATEMENT OF POINTS

The appellant, United States of America, makes the following statement of points on which appellant intends to rely upon the appeals herein:

1. The verdict is not supported by competent evidence.

2. The district court erred in admitting evidence as follows:

(a) The testimony of A. D. Castro as to average rent the lands condemned might return for truck gardening.

(b) The testimony of A. D. Castro and Ralph Kearns as to so-called average rental value.

(c) The testimony of A. D. Castro, Wilfred E. Harrison and John E. Russell as to value of the lands condemned.

(d) The testimony of A. D. Castro, Wellington S. Henderson and John Waterhouse relating to the value of money.

(e) The testimony of Wilfred E. Harrison as to possible plans for subdivision.

(f) The testimony of Wilfred E. Harrison as to time required for subdividing.

(g) The testimony of Ralph A. Kearns as to the theories applicable to the lands condemned.

(h) The testimony of Albert Waterhouse as to rent paid for other lands.

(i) The testimony of Albert Waterhouse as to his desires to lease additional lands.

(j) The testimony of Sam R. Damon as to subdivisions put on market by Damon estate.

(k) The testimony of Sam R. Damon and John E. Russell relating to plans of trustees of Damon estate with reference to lands condemned.

(l) The testimony of Sam R. Damon as to character of soil of lands covered by Waterhouse lease.

(m) The testimony of Sam R. Damon as to price paid for school lot.

(n) The testimony of John E. Russell relating to lands leased to Bishop National Bank.

(o) The testimony of John E. Russell as to rentals received from other subdivisions.

(p) Defendants' Exhibit 1.

(q) Defendants' Exhibit 2.

3. The district court erred in denying the several motions to strike the testimony of A. D. Castro, Wilfred E. Harrison, Wellington S. Henderson, Ralph A. Kearns and John E. Russell.

4. The district court erred in excluding evidence and denying offers of proof as follows:

(a) The testimony upon cross-examination of A. D. Castro relating to rate of capitalization.

(b) The testimony upon cross-examination of Wilfred E. Harrison and Ralph A. Kearns as to the experience of other subdivisions.

(c) The testimony of Ralph A. Kearns upon cross-examination as to the interest rate on loans on unimproved property.

(d) The testimony of Charles Crozier either in rebuttal or as direct testimony relating to subdivisions in 1933 as to other areas capable of subdivision or as to the number of houses built in Honolulu.

5. The district court erred in denying the motion to reopen the case or in restricting the scope of such reopening.

6. The district court erred in denying the motions for directed verdicts.

7. The district court erred in giving defendants' requested charges numbers 7, 8, 9 and 11 as amended.

8. The district court erred in refusing to give Government's requested charges numbers 1, 2, 3, 6, 7 and 9.

UNITED STATES OF AMERICA
By: NORMAN M. LITTELL
Assistant Attorney General

Service of the within Appellant's Statement of Points and receipt of a copy thereof is acknowledged this 17th day of April, 1942.

ROBERTSON, CASTLE & ANTHONY,
Attorneys for John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased.
By A. G. M. ROBERTSON,
for the foregoing attorneys.

[Endorsed]: Filed Apr. 23, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PORTION OF RECORD TO BE PRINTED AS RECORD ON APPEAL

John Waterhouse, Ernest H. Wodehouse, Walter F. Frear and John E. Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, appellees in the above entitled cause, hereby

designate as an additional portion of the record on appeal to be printed in said cause:

The instructions given by the Court to the jury as recorded by the reporter.

Dated, this 20th day of April 1942.

JOHN WATERHOUSE, ERNEST H. WODEHOUSE, WALTER F. FREAR and JOHN E. RUSSELL,

Trustees as aforesaid,

By ROBERTSON, CASTLE & ANTHONY

their attorneys

Service of a true copy hereof acknowledeged this 20 day of April 1942.

FRANK WICKHEM

Spec. Asst. to the Atty. Gen.

[Endorsed]: Filed May 7, 1942. Paul P. O'Brien, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10104—Jan. 6, 1943

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR, AND JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED, ET AL., APPELLEES

and

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR, AND JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED, ET AL., APPELLEES

Upon Appeals From the District Court of the United States for the Territory of Hawaii

Before: GARRECHT, HANEY, and HEALEY, Circuit Judges

HANEY, Circuit Judge.

The United States appeals from two judgments rendered against it in proceedings brought by it to condemn six parcels of land belonging to appellees.

Running westerly from Honolulu is Dillingham Boulevard, also called Pearl Harbor Road. Adjoining that road on the north is a railroad. Adjoining that railroad on the north is Kamehameha Highway which parallels Dillingham Boulevard and the railroad for a way, and then proceeds northwesterly, at about the westerly boundary of the first parcel of land hereafter mentioned.

The first parcel of land, known as lot C–3–B–2–A lies south of Dillingham Boulevard and the railroad and is nearly rectangular. Lot C–3–B–1 adjoins the first parcel on the west and is rectangular. Lot C–3–A adjoins the second parcel on the west and is also rectangular. Lot C–2 adjoins the third parcel on the west and is nearly rectangular. The south sides of these four

parcels and the west side of the fourth parcel (Lot C–2) adjoins Hickam Field, an air base of the United States Army. In the fourth parcel (Lot CO2) and at the northwest corner thereof, is a small parcel, nearly rectangular shape, the east and south sides of which adjoin Lot C–2, the west side of which adjoins Hickam Field, and the north side of which adjoins Dillingham Boulevard.

North of Dillingham Boulevard and the railroad is a triangular parcel known as Lot D or the gore Lot. The westerly boundary thereof is a continuance of the western boundary line of Lots C–2 and C–1 and intersects Kamehameha Highway at its northern point. The boundary line then turns to the southeast and follows the western side of Kamehameha Highway to a point where the latter runs parallel with Dillingham Boulevard and the railroad. From that point the boundary line runs west along the railroad to the western boundary line. One side of the triangle, which we may call the base, is thus immedintely north of Lots C–3–B–2–A, C–3–B–1, C–3–A, and C–2, and is separated from them by Dillingham Boulevard and the railroad. The northeast side of the triangle is Kamehameha Highway, and the Northwest side of the triangle adjoins Pearl Harbor Navy Yard, a United States Naval Base.

The acreage of the parcels is as follows: 118.920 acres in C–3–B–2–A; 24.036 acres in C–3–B–1; 50 acres in C–3–A; 75.039 acres in C–2; 2.249 acres in C–1; and 61.512 acres in D (gore lot). The total acreage is 331.756. Case No. 434 was filed on November 20, 1940, and covered the 77.288 acres contained in lots C–1 and C–2. Case No. 436 was filed on November 27, 1940, and covered all other lots mentioned having a total acreage of 254.468 acres. In the testimony, lot D (gore lot) was considered as one tract, lots C–1 and C–2 were considered another tract, and lots C–3–A, C–3–B–1, and C–3–B–2–A were considered as another tract. With the exception of Lot C–1, all the land was used for growing sugar cane. Lot C–1 was used as a parking lot for vehicles. All the lands were leased on July 27, 1927, as part of a tract of 1,451.66 acres for a term of 15 years commencing on January 1, 1929, at a rental of $23.50 per acre.

The lands are within the limits of the City and County of Honolulu, about nine miles west of the civic center of the city, and are referred to as lands belonging to the Damon Estate. About a mile and three-quarters closer to the city (east of the lands involved here), and north of, but adjoining Kamehameha Highway, the Damon Estate, in 1924, subdivided 9.5538 acres into 14 lots and leased them all within 6 months. At the time of trial, the net rental from them was $133.20 per acre. About a mile and a quarter east of the lands involved here, and south of Kamehameha

Highway, the Damon Estate in 1929 subdivided 121.532 acres into about 100 lots, and leased 90% of them in two or three years. The net rentals from them was $42.26 per acre. About half a mile east of the lands involved here, and south of Kamehameha Highway, the Damon Estate in 1933 subdivided 178.695 acres into about 300 lots and leased 90% of them in a little over three years. The net rentals from them was $63.88. Adjoining this last mentioned subdivision, on the west thereof, the Damon Estate in 1938, leased 9 acres to one Waterhouse, who subdivided the acreage. The rental therefor was $80 per acre.

Appellant's witnesses Crozier and Fernandes, collaborated and reached identical valuations. With respect to Lot D, they opined that a strip of land 200 feet wide along the northeast side of the triangle, and fronting on Kamehameha Highway had more value than the remainder. They valued Lot D at $25,283. With respect to Lots C–1 and C–2, they opined that a strip of land 250 feet wide along, and fronting on Dillingham Boulevard, had more value than the remainder. They valued Lots C–1 and C–2 at $33,498. With respect to Lots C–3–A, C–3–B–1 and C–3–B–2–A, they opined that a strip of land 200 feet wide along, and fronting on, Dillingham Boulevard, had more value than the remainder. They valued such lots at $78,706. With respect to all the lands except the frontages, they testified that the highest, best and most profitable use to which such lands were adapted was for growing sugarcane. With respect to the frontages, Crozier testified that the frontages, because of their proximity to the roads were more valuable because of their potential uses, but did not state what such uses were. Fernandes testified that a willing buyer would consider that the frontages had a higher and better value for possible future uses other than cane land, such as house and farm lots. Both witnesses placed a direct value per acre on all lands, distributed as above set forth.

All valuation witnesses for appellees testified that the lands had outgrown the category of cane lands, and that the highest, best and most profitable use for which the lands were adapted in November 1940, was residence, business and truck gardening. There was considerable evidence of a growing demand for such properties, and the reason therefor. There was also evidence that the Damon Estate had had a plan of subdivision for some time. The values given by each witness were "market values."

Castro, for appellees, valued Lot D at $79,311.75 by considering its best use as a subdivision. He arrived at that value by capitalizing, at 4%, the average rentals of $51.57 per acre which he said could be obtained by leasing the lots in the subdivision. He valued Lots C–1 and C–2 at $79,715.43 by considering its best use as a sub-

division. He arrived at that value by capitalizing, at 4%, the average rentals of $41.25 per acre which he said could be obtained by leasing the lots in the subdivision. He valued the remaining lots at $227,572.50, by considering their best use as a subdivision. He arrived at that value by capitalizing, at 4%, the average rentals of $47.176 which he said could be obtained by leasing the lots in the subdivision.

Harrison, for appellees, valued Lot D at $83,449.43 by considering its best use as a subdivision. He arrived at that value by valuing a portion of it directly as residential properties, and by capitalizing, at 5%, the average rentals which he said could be obtained from the lots in the subdivision which would be used as small farms. He used the same method in valuing the other lots. His valuation of Lots C–1 and C–2 was $63,772.35 and his valuation of the other lots was $182,058.

Kearns, for appellee, testified substantially the same as Harrison's testimony.

Appellee Russell, one of the trustees of the Damon Estate, valued the lands as an owner. He also valued the lands by considering their best use as a subdivision, and by capitalizing, at 4%, the earnings which he said would be made therefrom. His valuations were $127,931.25 for Lot D, $170,279.17 for Lots C–1 and C–2 and $216,134.75 from the remaining lots.

The Damon Estate holds other lands in the vicinity of the lands in question. On cross-examination appellees' valuation witnesses were asked whether the opening of some of these lands as subdivisions in competition with the lands in question considered as subdivisions, would affect the value of the lands in question. Castro testified that the value of the lands in question would not be affected by the competition of such subdivisions. Harrison testified that he had valued the lands knowing that the trustees had stated that they would not subdivide other lands. Kearns testified that the value of the lands in question would not be affected by subdivision of other lands "because the land on the mauka side, as far as I know, would not at any time be offered for sale" and that the assumption that such a subdivision might be made "appears to me to be somewhat preposterous, because I know the owners of this land and have known them a long time and know the methods they adopt with their property." Russell testified that his valuations were based on the assumption that there would be no competition from subdivisions of other lands owned by the Damon Estate, which competition he knew, would not exist.

In addition to the foregoing, Castro testified that subdivision of the lands in question "would require special negotiation and systematic and intelligent financing in order to develop the area

as a whole into a community section which in a reasonable period of time would be absorbed by the people in the market and made a valuable and important part of the City of Honolulu" and that was one of the things a willing buyer would have had in mind in November 1940.

In summary, the valuations given by the various witnesses and the verdicts, are as follows:

Source	Lots C-1 and C-2	Other lands		Total
		Lot D	Other lots	
Appellant	$83,486.00	$35,262.00	$78,700.00	$197,447.00
Harrison & Kearns	63,772.35	63,449.43	182,088.00	309,279.78
Castro	70,716.43	70,311.75	227,572.50	368,600.68
Russell	170,279.17	127,981.25	216,136.75	514,345.17
Verdicts	61,080.40	255,274.60		385,494.00

The instructions of the court below followed closely the law stated in Olson v. United States, 292 U. S. 246. In addition, the court gave the following instruction:

"In this case it is admitted without dispute in the testimony that the lands condemned are a part of a holding in the immediate vicinity, owned by the same respondents. In deciding this case, you are not to assume any particular type or policy or management on the part of the trustees with respect to the remainder of said lands. The very theory and hypothesis upon which this case is being tried is the assumption of a free and open market, of a willing purchaser and a willing buyer [seller] in a free transaction. In considering this case, therefore, you are not bound to assume that the Trustees of the Damon Estate would not release any of the lands in the immediate vicinity from their present status."

Appellant contends that the court should have instructed the jury to return verdicts in the amounts the government witnesses testified to, because the evidence of appellees' witnesses was inadmissible and should have been excluded. It is argued that appellees' witnesses capitalized the rental value of the lands on the basis of rentals which would be received from the property as subdivided; that "the prospect that agricultural land may be profitably subdivided for dwelling, business, and truck-garden sites, does not make it as valuable as an existing subdivision"; that the "jury may not consider estimates of the prices for which the land would sell if subdivided", and that "estimates as to the rents which could be derived from the land if it were improved" are not admissible. At the same time appellant says in its brief: "In other words, just compensation should include any enhancement in the value of the lands taken arising from the prospect that they could profitably be subdivided."

After careful scrutiny of the record, we believe the testimony for appellees was different from the description of it made by appellant. Appellees' valuation witnesses testified as to the market value of the land in November 1940. In giving the reasons for the respective values, the witnesses said in effect that a willing buyer would not consider the lands as cane lands only; that such a buyer would recognize that, in view of the demand for home sites, business sites and small farms and in view of the adaptability of the land for such purposes, he could pay more for the lands because the income therefrom, when used for the purposes mentioned would be greater, and that in determining what a willing buyer would pay for the land, such buyer would estimate the net income from the land when used as he would use it, and arrive at a value by capitalizing such income from which he would deduct his required profit, and thus arriving at an amount which he, as a willing buyer, would be willing to pay for the land.

Of course, in that chain of reasoning there are several variables, such as: (1) would a willing buyer consider the lands as anything but cane lands? (2) if so, could he afford to pay more, i. e., would the income be greater when used for other purposes; (3) would he determine the value by capitalizing the net income? (4) if so, what should the estimated income be? and (5) at what rate of interest should the income be capitalized? Because of these variables, it is easily seen why values arrived at by that method could not be conclusive. Yet, capitalization of rental value is evidence of the market value of the land. North American Telegraph Co. v. Northern Pac. Ry. Co., 8 Cir., 254 F. 417, cert. den. 249 U. S. 607; United States v. Shingle, 9 Cir., 91 F. (2d) 85, 89, cert. den. 302 U. S. 746.

Appellant's argument is based on the assumption that appellees' witnesses were testifying as to what prices the land would sell *for* if subdivided, and as to rents which could be derived from the land if it were improved. The effect of that argument is that such witnesses were testifying not as to present value but as to some future value. The record gives no support to that argument, but, in fact, shows that the witnesses were testifying as to the value of the land in November 1940.

The question remains as to whether the court below erred in permitting evidence of value as given by witnesses for appellee. The applicable rule is stated in Olson v. United States, supra, 255, 257, as follows:

"Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable.

The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held * * *

"* * * In respect of each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining * * * The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof. Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth * * *"

As applied here, the evidence was admissible if the use of the land as testified to was a "use for which the property is adaptable and needed or likely to be needed in the reasonably near future." The evidence was inadmissible if such use did "depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable." The determination of that question "is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of general notoriety as not to require proof."

Reduced to simple terms, this means, we think, that if there is any substantial evidence to show that the adaptability of the lands in question for the uses testified to was "reasonably probable," then the evidence was admissible, and it was for the jury to say whether such adaptability affected the market value of the lands. On that question we think the decision of the court below was correct. To begin with all valuation witnesses were agreed that the frontages were adaptable for purposes other than cane land. Even appellant's witnesses recognized that fact. The dispute existed only as to the remainder of the lands.

For appellees, there was testimony of a demand for the uses mentioned and of the reasons therefor. There was also evidence

of the record of previous subdivisions in that vicinity. Under these circumstances, we think the question was properly submitted to the jury.

Affirmed.

[Endorsed:] Opinion. Filed Jan. 6, 1943. Paul P. O'Brien, Clerk.

Decree

Appeals from the District Court of the United States for the Territory of Hawaii.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Territory of Hawaii, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgments of the said District Court in this cause be, and hereby are affirmed.

[Endorsed:] Decree. Filed and entered January 6, 1943. Paul P. O'Brien, Clerk.

Excerpt From Proceedings of Tuesday, March 2, 1943

Order denying petition for rehearing

Upon consideration of the petition of appellant, filed February 1, 1943, for a rehearing of above cause, and within time allowed therefor by rule of court, and of the briefs filed by the respective parties pursuant to filed order of this Court of February 6, 1943, and by direction of the Court, it is ordered that said petition for rehearing be, and hereby is denied.

Order staying issuance of mandate

Upon application of Hon. Norman M. Littell, Asst. Attorney General, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including August 2, 1943; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT,
United States Circuit Judge.

Dated: San Francisco, California, June 1, 1943.

[Endorsed:] Order, etc. Filed June 1, 1943. Paul P. O'Brien, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10104

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN WATERHOUSE, ET AL., APPELLEES

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN WATERHOUSE, ET AL., APPELLEES

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit to record certified under Rule 38 of the Revised Rules of the Supreme Court of the United States

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing four hundred seventy (470) pages, numbered from and including 1 and including 470, to be a full, true, and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 22d day of June 1943.

PAUL P. O'BRIEN, *Clerk.*

Order extending time within which to apply for writs of certiorari

On consideration of the motion of counsel for the petitioner in the above-entitled causes, and good cause therefor having been shown, it is now hereby ordered that the time within which a petition for writs of certiorari may be filed herein be and the same is hereby extended for a period of sixty days from June 1, 1943.

Dated this 28th day of May 1943.

WILLIAM O. DOUGLAS,
Associate Justice of the Supreme Court of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPPLEMENTAL TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. ————

UNITED STATES OF AMERICA, PETITIONER

vs.

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR, AND JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED, ET AL., RESPONDENTS

Upon Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

United States Circuit Court Appeals for the Ninth Circuit

No. 10104

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR, AND JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED, ET AL., APPELLEES

and

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN WATERHOUSE, ET AL., APPELLEES

Upon Appeals from the District Court of the United States for the Territory of Hawaii

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit

540361—43

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10104—Order

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR, AND JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED, ET AL., APPELLEES

and

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR AND JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED, ET AL., APPELLEES

Upon petition for rehearing

Before: GARRECHT, HANEY, and HEALY, Circuit Judges

The trial of this cause in the court below was had, and the opinion of this court on appeal was written without consideration of *United States* vs. *Miller*, et al. — U. S. —, January 4, 1943. Appellant has petitioned for rehearing, contending that our opinion is contrary to *U. S.* vs. *Miller*, supra. We think there is no merit in the contention as made. However, the cited case contains the following:

"If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by the factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

"The question then is whether the respondents' lands were probably within the scope of the project from the time the Govern-

ment was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities."

We find no evidence in the record before us upon the point raised in the quotation above. However, in view of the fact that the lands in question are contiguous to other lands owned by the United States and used for a public improvement or project, it is possible that the lands in question were contemplated originally by the United States to become a part of such projects or improvements. If so, *United States* v. *Miller* may have an important bearing upon the value of the land, and in order to do justice between the parties we think briefs should be filed and the United States be given an opportunity to present therein any contentions it may have upon the applicability of the rule quoted above from *United States* v. *Miller*. In this connection, we are inviting a statement from the United States as to whether or not (1) it makes any contention that the lands in question were originally contemplated to be taken as a part of a government project; (2) whether the record before us discloses whether or not the lands in question had enhanced in value because of the construction of the existing government projects. These questions only will be considered.

It is hereby ordered that appellant shall have ten days within which to file a brief covering the points above mentioned and that appellee shall have ten days thereafter within which to file an answer thereto, and that thereafter the court will decide whether or not a rehearing should be granted.

(s) FRANCIS A. GARRECHT,
United States Circuit Judge.
(s) BERT EMORY HANEY,
United States Circuit Judge.
(s) WILLIAM HEALY,
United States Circuit Judge.

(Endorsed:) Order, etc. Filed February 6, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 10104

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN WATERHOUSE, ET AL., APPELLEES

and

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN WATERHOUSE, ET AL., APPELLEES

Certificate of clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to supplemental transcript of record

I, Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that the foregoing three pages, numbered from and including 1 to and including 3, to be a full, true and correct copy of the order upon petition for rehearing made and filed on February 6, 1943, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States as a supplemental transcript of record in above cause, as the original thereof remains on file and appears of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of July 1943.

PAUL P. O'BRIEN.
Paul P. O'Brien, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1943

Supreme Court of the United States

Order allowing certiorari

Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR, AND JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on January 6, 1943, affirming judgments of the District Court of the United States for the Territory of Hawaii in eminent domain proceedings.

OPINIONS BELOW

The district court did not write an opinion. The opinion of the circuit court of appeals (R. 457–464) is reported in 132 F. 2d 699.

JURISDICTION

The judgment of the circuit court of appeals was entered January 6, 1943 (R. 464). Petition for rehearing was denied March 2, 1943 (R. 464). On May 28, 1943, Mr. Justice Douglas extended the time for filing a petition for certiorari for a period of sixty days from June 1, 1943 (R. 465). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in determining the value of agricultural land claimed to be adaptable for subdivision purposes, the jury may consider testimony that the present value of the land is a figure arrived at by capitalizing the net income which, in the opinion of the witnesses, would be produced if the lands were subdivided and leased for dwellings, business places, and truck gardens.

2. Whether just compensation includes increases in the value of lands condemned, resulting from authorization of the project for which they are taken.

3. Whether just compensation for lands condemned may include the increment the owner might realize by withholding from sale other competitive lands.

STATEMENT

Commencing in 1939 the United States expanded its military installations at Pearl Harbor Navy Yard and Hickam Field. Between April 26, 1939, and September 9, 1940, Congress appropriated some $30,000,000.00 for specific projects at this military base.[1] During this same period consideration was given to the housing requirements of Army and Navy personnel and national defense workers, particular attention being given to the problem in Hawaii.[2] For the purpose of providing such housing the Act of May 25, 1939, 53 Stat. 757, 774, included an appropriation of $165,000.00 for acquisition of the necessary site. The hearings on this item show that the tract to be acquired was approximately 350 acres of sugar-cane lands, contiguous to Pearl Harbor and Hickam Field, owned by the Damon Estate. Hearings on

[1] See Act of April 26, 1939, 53 Stat. 592, 607; Act of May 25, 1939, 53 Stat. 757; Act of August 9, 1939, 53 Stat. 1301, 1322; Act of June 11, 1940, 54 Stat. 265, 281, 294; Act of June 13, 1940, 54 Stat. 350, 361; Act of September 9, 1940, 54 Stat. 872, 877, 880.

[2] Act of May 25, 1939, 53 Stat. 757, 774; Act of June 2, 1939, 53 Stat. 798; Act of June 28, 1940, 54 Stat. 676, 681; Act of September 9, 1940, 54 Stat. 872, 883; Lanham Act of October 14, 1940, 54 Stat. 1125; see 84 Cong. Rec. pt. 6, p. 5808 (1939); S. Rep. 390, 76th Cong., 1st sess. (1939); H. Rep. 192, 76th Cong., 1st sess. (1939); H. Rep. 2706, 76th Cong., 3d sess. (1940).

Navy Department Appropriation Bill for 1940, H. Subcommittee on Appropriations, 76th Cong., 1st sess. (1939) p. 416.

Accordingly, in November 1940, the United States instituted two condemnation proceedings, accompanied by declarations of taking, to acquire this land, one suit (No. 436 in the district court) embracing 254.468 acres for the Navy Department (R. 42), and the other (No. 434 in the district court) 77.288 acres for army housing (R. 11). The Government deposited estimated compensation totalling $157,369.94 for the land and improvements (R. 17, 59).[2] Inasmuch as the lands involved in the two suits are contiguous and both owned by the Damon Estate, the proceedings were consolidated for trial (R. 103, 105). The cases were tried before a jury which returned verdicts totalling $265,404.80 (R. 440–441). The disputed questions here raised relate to the method by which respondents were permitted to prove value. The valuation evidence may be sumarized as follows:

With the exception of a two-acre parking lot (R. 322–325), all of the lands condemned were, at the time of taking, used for growing sugar cane (R. 116). The owners, the trustees of the Damon Estate, had leased a total of 1,451.66 acres, including the 331 acres here involved, to the Honolulu

[2] Of the amount deposited, $15,639.90 was allocated to growing crops and improvements claimed by the lessee, the Honolulu Plantation Company (R. 59). The value of these items is not here involved (R. 103).

Plantation Company for a term of 15 years from January 1, 1929, at an average annual rental of $23.50 an acre for the sugar cane land (R. 311–313). Experts for the Government stated that the best use of most of the lands was for the growing of sugar cane but that certain highway frontage had some additional value for residential or business purposes. These witnesses valued the lands at a total of $137,487.00, based upon a selling price per square foot (R. 117–125, 134–140).

Respondents took the view that all of the lands had outgrown the category of cane lands and were best suited for subdivisions into residence lots and truck farms (R. 154–155). Based upon this theory, respondents' four experts reached values ranging from $309,279.78 to $514,345.17 (R. 160, 167, 169, 206, 209, 240, 243, 246–247, 321, 325, 330). Castro, the first witness, assumed subdivision of the land into lots which could be leased for dwellings, business places and truck gardens. He then determined the average yearly net rental[4] which he estimated could be obtained from such a subdivision and capitalized such rentals at four percent. The result he called fair market value at the date of taking. (R. 158–169.) Respondents' next two valuation witnesses, Harrison and Kearns, who collaborated on their appraisals (R. 260), followed a similar method of determining value as to

[4] This "net" rental assumed that the lessee would pay all taxes, improvement assessments, water rates, and similar charges (R. 194).

at least some of the land involved (R. 206–218, 221–224, 240–248, 260–265). They capitalized their prospective rentals at five percent (R. 210–213, 262).

The last witness as to value was respondent Russell, who was chosen to represent the other trustees (R. 340). He envisaged subdivision of the entire area into lots which could be leased for residence and business purposes. He capitalized at four percent the estimated income from such leases after deduction of expenses. (R. 314–321, 325–326, 330.)

All of these opinions were based upon the belief that a demand for residence and truck farms existed and would continue in the future (R. 169, 181–182, 205, 206, 207, 227, 239, 242–243, 248–249, 285–287, 317, 320, 345–346, 353). To support this view Russell and Sam R. Damon, a beneficiary of the Damon Estate (R. 282), testified that they had a plan for development of their holdings in the vicinity (R. 287–290, 314–318), a portion of the lands here condemned being fifth or sixth in the order of development (R. 317–318). However, the schedule was revised because of the "tremendous amount of development work going on at Hickan and Pearl Harbor" so as to advance the time the condemned lands would be developed (R. 318). All of the witnesses believed that the lands could be successfully subdivided largely because of the demand created by Army and Navy personnel and defense workers (R. 177–

178, 181–182, 205, 239–240, 285–291, 320, 326). The estimates of income upon which the capitalizations were based assumed that the subdivision would be accomplished five or six years in the future, i. e., 1945 or 1946 (R. 218–219, 248–249, 353). The witnesses assumed not merely a continuance to 1946 of the defense housing demand but in fact based their valuations on the assumption that the demand "was going to accelerate very rapidly" (R. 345). Most of respondent's witnesses further assumed that there would be no competition from other lands owned by the Damon Estate in the vicinity (R. 225–227, 253–254, 351–353). And Russell admitted that the rentals he capitalized could only be obtained by withholding those other lands from the market (R. 342).

The Government resisted admission of respondents' scheme of valuation by direct objections (R. 159, 161, 208), by motions to strike the testimony (R. 167–168, 194, 197, 219, 262, 314–315, 418–419), by requested charges (R. 90–91), and by motions for directed verdicts (R. 31, 71, 419). All of these objections were overruled. Some nine hours after the jury retired the instructions concerning potential uses were repeated at the request of one of the jurors (R. 434–438). The verdicts were returned the next day (R. 440) and judgments were thereafter entered (R. 33–35, 75).

The circuit court of appeals affirmed in an opinion announced January 6, 1943. The Government

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petitioned for rehearing, calling attention to the intervening decision of this Court in *United States* v. *Miller*, 317 U. S. 369. On February 6, 1943, an order was entered stating that the opinion had been written without consideration of the *Miller* decision and inviting a supplemental memorandum on the applicability of that case. Such memorandum was filed, but the petition for rehearing was subsequently denied (R. 464).

REASONS FOR GRANTING THE WRIT

1. The Government contended in the courts below that valuations based solely on capitalization of income which the witnesses estimated might be obtained from leases after subdivision of the sugar cane lands into lots and truck farms were not admissible. The circuit court of appeals recognized that many assumptions are involved in this method of valuation, such as the rental to be earned, expenses to be deducted therefrom, and the rate of interest at which to capitalize (R. 462).[5] Nevertheless, the court concluded that "capitalization of rental value is evidence of the market value of the land" even when calculated on the basis of

[5] The speculation involved in the choice of interest rate is emphasized in Schmutz, *Condemnation Appraiser's Handbook* (1938), p. 149, where it is pointed out that capitalization based on a 5% rather than a 6% rate results in a 20% higher valuation. Respondents' witness Henderson, who testified to an interest rate of 3% to 4%, admitted that he was not qualified to advise on real estate (R. 237). See also R. 307–308.

prospective rentals from a nonexistent subdivision (R. 462).

Thus, there is presented the very question which this Court found it unnecessary to pass upon in *United States ex rel. T. V. A.* v. *Powelson,* No. 3, 1942 Term, namely, whether value may be determined by capitalizing hypothetical profits from an imaginary project upon the property taken. See advance sheets, p. 14. The cases cited by the court below (R. 462) merely stand for the proposition that the capitalization of rentals accruing from *existing* leases is some evidence of market value. All of the decisions of both the federal and state courts exclude capitalization of estimated rent or income from *prospective* enterprises because too speculative or conjectural. *United States* v. *Meyer,* 113 F. 2d 387, 397 (C. C. A. 7), certiorari denied, 311 U. S. 706; *United States* v. *Davis,* 41 F. Supp.595 (E. D. Tenn.); *East Bay Municipal Utility Dist.* v. *Lodi,* 120 Cal. App. 740, 760–761, 8 P. 2d 532; and cases cited by this Court in footnote 14 of the *Powelson* decision. The only reason advanced by the court below to justify such evidence was the witnesses' assertion that a willing buyer would indulge in such speculations (R. 462). It is true that an expert, in arriving at his opinion of market value, may consider numerous items, such as offers, remote sales, and tax assessments, which would not be admissible if offered as direct evidence of value.

But when, as here, his valuation is based solely on nonadmissible items, his opinion of value is likewise inadmissible. *Atlantic Coast Line R. Co.* v. *United States,* 132 F. 2d 959, 963 (C. C. A. 5); see Orgel, *Valuation under Eminent Domain* (1936), sec. 131, pp. 446–448.

Moreover, even apart from the capitalization of hypothetical profits, respondents' valuations were not admissible because they were based, not on the value of the property as a whole, but on the aggregate rental or sale price of the individual lots and truck farms into which the experts assumed the sugar cane land could be subdivided. Here again the courts which have passed upon the question are agreed that evidence as to the price unimproved land would sell for if subdivided or as to the rents which might be derived from the land if improved is not admissible. *Pennsylvania S. V. R. Co.* v. *Cleary,* 125 Pa. 442, 451, 17 Atl. 468; *Kansas City and Topeka R. Co.* v. *Splitlog,* 45 Kan. 68, 72, 25 Pac. 202; *Burt* v. *Wigglesworth,* 117 Mass. 302, 306; *Greenfield* v. *Philadelphia,* 282 Pa. 344, 354, 127 Atl. 768; *Blackwell's Island Bridge,* 118 App. Div. 272, 274–275, 103 N. Y. Supp. 441; *Monongahela W. P. Pub. Serv. Co.* v. *Monongahela Develop. Co.,* 101 W. Va. 165, 132 S. E. 380. The conjectural nature of respondents' assumption is apparent from the fact that their witnesses agreed that the successful completion of the subdivision could not

be accomplished before 1945 or 1946 (R. 218–219, 248–249, 346).[6]

Whether such speculative evidence is to be admitted in condemnation cases is a question of considerable importance to the Government, which at the present time is engaged in condemning some 8,000,000 acres of land for national defense and other purposes. The Government is repeatedly confronted with attempts of private landowners to inject into the valuation proceedings grandiose plans for the development of unimproved property, the value to be determined by the capitalization of prospective profits or by the estimated prices of individual lots in a hypothetical subdivision.

2. Furthermore, the use of the capitalization method in this case has compelled the United States to pay enhancement of value occurring after the Government was committed to the project, contrary to this Court's decision in *United States* v. *Miller*, 317 U. S. 369.

One of the important projects in connection with the national defense program was the expansion of the naval and military base at Pearl Harbor and

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[6] "The trial court cannot be too careful in excluding evidence of this character, as witnesses can always be found who will, in their imagination, cover the most hopelessly unmarketable vacant land in the neighborhood of a large city with apartment houses filled with desirable tenants, and, with the aid of a little figuring, capitalize the prospective net income at ten times the actual value of the land." 2 Nichols, *Eminent Domain* (2d ed. 1917), sec. 445, p. 1171.

Hickam Field. An essential element thereof was the securing of housing for military and civilian personnel. Other negotiations having failed, an appropriation and authority for acquisition were granted by Congress in May 1939. From the hearings upon the appropriation, there can be no doubt that the specific lands here involved were the lands to be acquired. (See Appendix, *infra*, p. 15.)

Nor can there be any doubt that respondents' witnesses largely based their estimates upon the increased demand resulting from the expansion program undertaken by Congress in 1939 (R. 205, 239–240, 285–291, 287, 315, 320, 326). In fact, it was this demand which led respondents to advance the date when they proposed to develop these lands (R. 318). And the witnesses did not stop with the date of taking, November 1940. They assumed that the subdivision would be accomplished five or six years in the future, i. e., 1945 or 1946 (R. 218–219, 248–249, 346) and that the greatly increased demand due to national defense workers would not only continue to 1946 but that "it was going to accelerate very rapidly" (R. 345; see also R. 263–264, 270).[1] Thus, the valuation by

[1] The witnesses were compelled to assume such continuance of the demand in order to make their hypothetical subdivision successful. Castro testified that if the land was available in November 1940, "at least one-third of it would be absorbed for homes" (R. 169). And Russell stated (R. 353) that "Some of those lots would be years off before they would be put on the market at all."

capitalization of future earnings has permitted respondents to include enhancement of value which they thought would occur even after the Government condemned the lands. "The owners ought not to gain by speculating on probable increase in value due to the Government's activities." *United States* v. *Miller*, 317 U. S. 369, 377.

3. Respondents' valuations were also based on the assumption that there would be no competition from other lands owned by the Damon estate. The lack of competition was an essential part of respondents' valuations, and the witnesses refused to estimate to what extent competition would reduce their estimates (R. 254–255, 351–353). As Kearns expressed it (R. 254), "We had in mind that it had a greater value to the present owners than to anyone else." The Government's objections to valuations based on such an assumption were overruled and its request for a charge that the jury should assume that neighboring lands would be in competition with the lands condemned was denied (R. 85). Instead, a charge was given permitting the jury to base its verdicts on the assumption that the other lands would be withheld from competition.[8]

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[8] The court charged the jury that, "you are not bound to assume that the Trustees of the Damon Estate would not release any of the lands in the immediate vicinity from their present status" (R. 428). As thus phrased, the charge did not prohibit the jury from returning an award based in part upon the Damon estate's monopoly of land in that area.

In *United States* v. *Miller*, 317 U. S. 369, 375, this Court emphasized the fact that elements of value relating to special adaptability of the land to the use of the owner must be disregarded. Since it is obvious that a willing buyer would not pay an increased value on the assumption that respondents would withhold their other lands from competition, there is no reason why the Government in a condemnation proceeding should be required to pay monopoly prices.

CONCLUSION

It is respectfully submitted that for the reasons stated this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

JULY 1943.

APPENDIX

Comparison of testimony of Rear Admiral Ben Moreell, Chief of Bureau of Yards and Docks on April 5, 1939 before House Subcommittee on Appropriations (page 416 of Hearings) with facts in the record.

TESTIMONY	FACTS IN RECORD
NAVY YARD, PEARL HARBOR, HAWAII	
Purchase of Land	
Mr. FERNANDEZ. The first item is $165,000 for the purchase of land at the Navy Yard, Pearl Harbor, Hawaii.	
Admiral MOREELL. This project was authorized by the act of June 25, 1938.	
The Pearl Harbor Navy Yard is the principal outlying naval base of the United States and is a most important activity for the repair, upkeep, and support of the United States Fleet in the Pacific. The area of the naval base is limited and there is not sufficient land for the development of housing areas for industrial civilian personnel and enlisted personnel.	
The housing situation in the vicinity of Pearl Harbor is acute and efforts have been made through the Federal	Russell testified he knew the Navy was interested in having the Damon Estate erect a series of low-costs to

Housing Administration to secure low-priced housing for officers, enlisted, and civilian personnel. To date no satisfactory solution has been reached and it appears impracticable to obtain the needed housing by reliance on private parties.

This project contemplates the acquisition of a tract of land adjacent to the navy yard, to be developed as funds become available, for housing of the various classes of personnel attached or assigned to the station. It is proposed that this area be developed to meet the immediate needs to relieve the present acute housing situation, with provision for future expansion in time of emergency.

The area contains about 350 acres.

Mr. FERNANDEZ. Did that authorization contemplate the utilization of this land for civilian employees?

ADMIRAL MOREELL. Yes, sir.

Mr. FERNANDEZ. Has there been an expansion of the civilian personnel there recently?

ADMIRAL MOREELL. Not in the immediate past; no, sir.

Mr. FERNANDEZ. Is there any other land in this immediate vicinity that is suitable for quarters?

relieve the housing shortage at Pearl Harbor (R. 337).

Russell testified the urgent demand for the lot just outside the navy yard gate had been present for a year and a half before November 1940, i. e., about June 1939 (R. 318). He also stated that Army and Navy activities particularly affected the demand for this lot (R. 320).

The lands condemned total 331.756 acres (R. 22, 42).

The land adjoins Pearl Harbor and Hickam Field. See map, Ex. G, original.

ADMIRAL MORRELL. No, sir.

Mr. FERNANDEZ. How do you arrive at the figure of $165,000?

The deposit for land and improvements of $157,369.94 (R. 22, 57) equals about $474 per acre. $165,000 for 350 acres equals about $471 per acre.

Admiral MORRELL. That is a figure estimated by the Commandant. The land belongs to several estates, and I understand that by the terms of the trusteeship they are not allowed to quote a price.

I have here a statement from the Commandant, from which I quote as follows:

It was evident, from negotiations with owners of these parcels, that they were very reluctant to fix definite prices for the parcels in question. The Commandant is of the opinion, however, that the amount of $165,000 is sufficient to cover all of the tracts proposed to be purchased. An area of 244 acres is classed as cane land, 48 acres are classed as pasture land, 72 acres as fishponds and waste lands, and approximately 1½ acres are classed as semicommercial lands. The average price per acre approximates the price awarded in condemnation proceedings for land of high potential value for agriculture.

Russell, one of the trustees of the Damon Estate, testified that in 1939 and 1940 negotiations were had with the Navy Department relating to a housing development (R. 326, 335–337).

That would approximate the price paid by the Army for Hickam Field, or $441 per acre.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 209

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR AND JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not write an opinion. The opinion of the circuit court of appeals (R. 457–464) is reported in 132 F. 2d 699.

JURISDICTION

The judgment of the circuit court of appeals was entered January 6, 1943 (R. 464). A petition for rehearing was denied March 2, 1943 (R. 464). The petition for a writ of certiorari was filed July

29, 1943, within the time as extended by a Justice of this Court (R. 465) and was granted October 11, 1943 (R. 471). The jurisdiction of this Court rests upon section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in determining the value of agriculture land claimed to be adaptable for subdivision purposes, the jury may consider testimony that the present value of the land is a figure arrived at by capitalizing the income which, in the opinion of the witnesses, would be produced if the lands were subdivided and leased for dwellings, business places, and truck gardens.

2. Whether just compensation for lands condemned includes the increment the owner might realize by withholding from sale other competitive lands.

3. Whether just compensation includes increases in the value of lands condemned, resulting from authorization of the project for which they are taken.

STATEMENT

In 1939 the United States began to expand its military installations at Pearl Harbor Navy Yard and Hickam Field. Between April 26, 1939 and September 9, 1940, Congress appropriated some $30,000,000.00 for specific projects at this naval and military base.[1] During this same period

[1] See Act of April 26, 1939, 53 Stat. 592, 607; Act of May 25, 1939, 53 Stat. 757; Act of August 9, 1939, 53 Stat. 1301,

consideration was given to the housing requirements of Army and Navy personnel and national defense workers, particular attention being given to the problems in Hawaii.[2] For the purpose of providing such housing in Hawaii the Act of May 25, 1939, 53 Stat. 757, 774, included an appropriation of $165,000.00 for acquisition of the necessary site. The hearings on this item show that the tract to be acquired was approximately 350 acres of sugar-cane lands, contiguous to Pearl Harbor and Hickam Field, owned by the Damon Estate. See Hearings on Navy Department Appropriation Bill for 1940, H. Subcommittee on Appropriations, 76th Cong., 1st sess. (1939), p. 416; Appendix, *infra* pp. 37–39.

Accordingly, in November 1940, the United States instituted two condemnation proceedings, accompanied by declarations of taking, to acquire this land, one suit (No. 436 in the district court) embracing 254.468 acres for the Navy Department (R. 42, 51) and the other (No. 434 in the district court) 77.288 acres for army housing

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1322; Act of June 11, 1940, 54 Stat. 265, 281, 294; Act of June 13, 1940, 54 Stat. 350, 361; Act of September 9, 1940, 54 Stat. 872, 877, 880.

[2] Act of May 25, 1939, 53 Stat. 757, 774; Act of June 2, 1939, 53 Stat. 798; Act of June 28, 1940, 54 Stat. 676, 681; Act of September 9, 1940, 54 Stat. 872, 883; Lanham Act of October 14, 1940, 54 Stat. 1125; see 84 Cong. Rec. pt. 6, p. 5808 (1939); S. Rep. 390, 76th Cong., 1st sess. (1939); H. Rep. 192, 76th Cong., 1st sess. (1939); H. Rep. 2706, 76th Cong., 3d sess. (1940).

(R. 11, 19). The Government deposited estimated compensation totalling $157,369.94 for the land and improvements (R. 17, 59).[3] Inasmuch as the lands involved in the two suits are contiguous and both owned by the Damon Estate, the proceedings were consolidated for trial (R. 103). The cases were tried before a jury which returned verdicts totalling $265,404.80 (R. 440–441). The disputed questions here raised relate to the method by which respondents were permitted to prove value. The valuation evidence may be summarized as follows:

With the exception of a two-acre parking lot (R. 322–325), all of the lands condemned were, at the time of taking, used for growing sugar cane (R. 158). The owners, the trustees of the Damon Estate, had leased a total of 1,451.66 acres, including the 331 acres here involved, to the Honolulu Plantation Company for a term of 15 years from January 1, 1929, at an average annual rental of $23.50 an acre for the sugar-cane lands (R. 312–313). Experts for the Government stated that the best use of most of the lands was for the growing of sugar cane but that certain highway frontage had some additional value because of the possibility of use for residential or business purposes. These witnesses valued the lands at a total of

[3] Of the amount deposited, $15,639.90 was allocated to growing crops and improvements claimed by the lessee, the Honolulu Plantation Company (R. 59). The value of these items is not here involved (R. 103).

$137,487.00, based upon a selling price per square foot. (R. 117–125, 134–140.)

Respondents took the view that all of the lands had outgrown the category of cane lands and were best suited for subdivisions into residence lots and truck farms (R. 154–155). Based upon this theory, respondents' four experts reached values ranging from $309,279.78 to $514,345.17 (R. 160, 167, 169, 206, 209, 240, 243, 246–247, 321, 325, 330). Castro, the first witness, assumed subdivision of the land into lots which could be leased for dwellings, business places, and truck gardens. He then determined the average yearly "net" rent[4] which he estimated could be obtained from such a subdivision and capitalized such rentals at four percent. The result he called fair market value at the date of taking. (R. 160–161, 167, 169.) Respondents' next two witnesses, Harrison and Kearns, who collaborated on their appraisals (R. 260), followed a similar method of determining "fair market value." They divided each parcel into two types of land, residence property near the highways and truck farm lots to the rear. They capitalized at five percent an estimated rental on the truck farm lots, and they put a selling price upon each residence lot. (R. 210–213, 240–242, 262). The last witness as to value was

[4] This "net" rental assumed that the lessee would pay all taxes, improvement assessments, water rates, and similar charges (R. 194).

respondent Russell, who was chosen to represent the other trustees (R. 340). He envisaged subdivision of the entire area into lots which could be leased for residence and business purposes. He capitalized at four percent the estimated income from such leases after deduction of expenses. (R. 314, 319, 321, 325–326.)

All of these opinions were based upon the belief that a demand for residence and truck farms existed and would continue in the future (R. 169, 181–182, 205, 206, 207, 227, 239, 242–243, 248–249, 285–287, 317, 320, 345–346, 353). To support this view Russell and Sam Damon, a beneficiary of the Damon Estate (R. 282), testified that they had a plan for development of their holdings in the vicinity (R. 287–290, 314–318), a portion of the lands here condemned being fifth or sixth in the order of development (R. 317–318). However, the schedule was revised because of the "tremendous amount of development work going on at Hickam Field and Pearl Harbor" so as to advance the time the condemned lands would be developed (R. 318). All of the witnesses believed that the lands could be successfully subdivided largely because of the demand created by Army and Navy personnel and defense workers (R. 177–178, 181–182, 205, 239–240, 285–291, 320, 326). The estimates of income upon which the capitalizations were based assumed that the subdivision would be accomplished five or six years in the future,

i. e., 1945 or 1946 (R. 218–219, 248–249, 346). The witnesses assumed not merely a continuance to 1946 of the defense housing demand but in fact based their valuations on the assumption that the demand "was going to accelerate very rapidly" (R. 345). Most of the witnesses further assumed that there would be no competition from other lands owned by the Damon Estate in the vicinity (R. 225–227, 253–254, 351–353). And Russell admitted that the rentals he capitalized could only be obtained by withholding those other lands from the market (R. 342).

The Government resisted admission of respondent's scheme of valuation by direct objections (R. 159, 161, 208), by motions to strike the testimony (R. 167–168, 194, 197, 219, 262, 314–315, 418–419), by requested charges (R. 90–91), and by motions for directed verdicts (R. 31, 71, 419). All of these objections were overruled. Some nine hours after the jury retired, the instructions concerning potential uses were repeated at the request of one of the jurors (R. 434–438). The verdicts were returned the next day (R. 440) and judgments were thereafter entered (R. 34–35, 75). The Circuit Court of Appeals affirmed [5] (R. 457–464).

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[5] The Government petitioned for rehearing, calling attention to the intervening decision of this Court in *United States* v. *Miller*, 317 U. S. 369. On February 6, 1943, an order was entered stating that the opinion had been written without consideration of the *Miller* decision and inviting a

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the value of agricultural land claimed to be adaptable for subdivision purposes may be determined by capitalizing the estimated income which might be produced if the lands were subdivided and leased for dwellings, business places, and truck gardens.

2. In holding that elements of value arising from a landowner's monopoly of undeveloped land may be included in the just compensation awarded upon condemnation of a small part of that land.

3. In holding that enhancement of value due to the project for which lands are taken may be included in the compensation paid for such lands.

4. In affirming the judgments of the district court.

SUMMARY OF ARGUMENT

I

All of respondents' witnesses based their valuations upon the estimated sales prices or the capitalization of estimated rentals which they thought could be obtained from residence, business, or truck farm lots after subdivision of the sugarcane lands. Such evidence was wholly incompetent and should have been excluded for the following reasons:

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supplemental memorandum on the applicability of that case (R. 468–469). Such memorandum was filed, but the petition for rehearing was subsequently denied (R. 464).

A. The conversion of farm land into a residential subdivision requires that many expensive improvements be made. For example, streets must be laid out and constructed, and water, sewage, electric lines, and other utility systems must be installed. When farm land is condemned, the probable use for residences may be considered "to the full extent that the prospect of demand for such use affects the market value." *Olson* v. *United States,* 292 U. S. 246, 255. But the land may not be valued as if the conversion to a successful residential subdivision had already taken place. Hence, valuations which are based upon the amounts for which the lots would sell or rent after subdivision are incompetent as evidence of market value of the farm land. *Chatfield* v. *Board of Revision of Taxes,* 346 Pa. 159, 29 Atl. 2d 685; *Pennsylvania S. V. R. Co.* v. *Cleary,* 125 Pa. 442, 17 Atl. 468; *Kansas City and Topeka Ry. Co.* v. *Splitlog,* 45 Kan. 68, 25 Pac. 202.

Moreover, respondents' valuations assumed that all of the lots in the projected subdivision could be sold five or six years in the future. Upon this hypothesis other assumptions were made as to the prices at which individual lots might be sold and the amount of the various expenses which would be incurred in subdividing the farm land. These speculations are likely to mislead a jury and introduce many collateral issues. For this additional reason, the evidence was not competent as

proof of the present market value of the farm land. *Laureldale Cemetery Co.* v. *Reading Co.*, 303 Pa. 315, 154 Atl. 372; *Burt* v. *Wigglesworth*, 117 Mass. 302; *Matter of City of New York (Blackwell's Island Bridge)*, 118 App. Div. 272, 103 N. Y. Supp. 441.

B. For similar reasons, valuations obtained by the capitalization of the estimated return from leases upon residence lots after subdivision of agricultural land are not competent evidence of the present market value of the farm land. The income is not attributable wholly to the land but represents the earnings upon the promoter's services and upon the investment in the improvements which would be required to develop the subdivision. Such valuations are highly speculative because they assume successful subdivision and leasing five or six years in the future. In addition, the allocation of income between land, improvements and promoter's services and the rate of interest at which the land income is to be capitalized have no factual basis but are entirely conjectural. *San Diego Land & Town Co.* v. *Neale*, 88 Cal. 50, 25 Pac. 977; *Pullman Co.* v. *Chicago*, 224 Ill. 248, 79 N. E. 572; *Hamilton* v. *Pittsburgh B. & L. E. R. Co.*, 190 Pa. 51, 42 Atl. 369; *New York Central R. R. Co.* v. *Maloney*, 234 N. Y. 208, 137 N. E. 305.

C. This is not a case where, among many other indicia of value, the capitalization of estimated

return from the assumed subdivision was considered and accorded the weight to which it might be entitled. This method of valuation was the principal basis of the opinions of respondents' experts. Where the experts' valuations are thus based on non-admissible items, their opinions of value are likewise inadmissible. *Atlantic Coast Line R. Co.* v. *United States,* 132 F. 2d 959, 963 (C. C. A. 5).

II

The notion that the lands condemned could be successfully subdivided and all the lots sold in five or six years was based on the assumption that a large area of contiguous lands, more than three times the acreage of the lands taken, would be withheld from competition. Elements of value arising from the fact that the owner may not want to part with the land because of its special adaptability to his own use must be disregarded in determining just compensation. *United States* v. *Miller,* 317 U. S. 369, 375. Since it is obvious that a willing buyer would not pay an increased value on the assumption that respondents would withhold their other lands from competition, there is no reason why the Government in a condemnation proceeding should be required to pay monopoly prices.

III

Commencing about May 1939, the military base at Pearl Harbor and Hickam Field was largely

expanded. At this time, authority was given and appropriation was made to acquire the specific lands here condemned in order to furnish housing required by the expansion project. The lands were condemned in November 1940. The housing demand created by "the tremendous development work going on at Hickam Field and Pearl Harbor" was the principal basis of the belief that the lands condemned could be successfully subdivided. It is therefore plain that the verdicts include enhancement of value occurring because of the project for which the lands were taken, contrary to the principle enunciated in *United States* v. *Miller*, 317 U. S. 369.

Respondents here went even further. The belief that subdivision could be successfully accomplished five or six years in the future was based upon the expectation that the Government's demand for housing "was going to accelerate very rapidly." Hence, the valuations included anticipated enhancement even after the taking.

ARGUMENT

I

THE PRESENT VALUE OF AGRICULTURAL LAND CLAIMED TO BE ADAPTABLE FOR SUBDIVISION PURPOSES MAY NOT BE ARRIVED AT BY CAPITALIZING THE NET INCOME WHICH, IN THE OPINION OF WITNESSES, COULD BE DERIVED FROM THE LANDS IF THEY WERE SUBDIVIDED AND LEASED FOR DWELLINGS, BUSINESS PLACES, AND TRUCK GARDENS

A. *Agricultural land may not be valued by hypothetically subdividing it into residence and business lots.*—In determining the market value

of property condemned, the highest and best use for which the property is adapted and needed or likely to be needed in the reasonably near future may be considered. *Olson* v. *United States*, 292 U. S. 246, 255. In this connection, the location of the property and other facts indicating existence of a demand for such purpose may be shown to the jury. But the courts have universally excluded evidence as to the number of lots into which agricultural land might be subdivided and the amounts at which the lots might sell or rent after subdivision. *Pennsylvania S. V. R. Co.* v. *Cleary*, 125 Pa. 442, 451, 17 Atl. 468; *Hall* v. *Delaware, L. & W. R. Co.*, 262 Pa. 292, 105 Atl. 98; *Laureldale Cemetery Co.* v. *Reading Co.*, 303 Pa. 315, 154 Atl. 372; *Chatfield* v. *Board of Revision of Taxes*, 346 Pa. 159, 29 Atl. 2d 685; *Kansas City and Topeka Ry. Co.* v. *Splitlog*, 45 Kan. 68, 72, 25 Pac. 202; *City of Los Angeles* v. *Hughes*, 202 Cal. 731, 262 Pac. 737; *Louisville & N. R. Co.* v. *R. E. E. De Montluzin Co.*, 166 La. 211, 116 So. 854; *Monongahela W. P. Pub. Serv. Co.* v. *Monongahela Develop. Co.*, 101 W. Va. 165, 132 S. E. 380; *Wadsworth Land Co.* v. *Piedmont Traction Co.*, 162 N. C. 314, 78 S. E. 299; cf. *Pullman Co.* v. *Chicago*, 224 Ill. 248, 79 N. E. 572; *Burt* v. *Wigglesworth*, 117 Mass. 302, 306; *Greenfield* v. *City of Philadelphia*, 282 Pa. 344, 354, 127 Atl. 768; *Matter of City of New York* (*Blackwell's Island Bridge*), 118 App. Div. 272, 274–275, 103 N. Y.

Supp. 441; *Tallman* v. *Met. El. R. R. Co.*, 121 N. Y. 119, 23 N. E. 1134; Schmutz, *Condemnation Appraiser's Handbook* (1938) p. 136. As the court said in *Pennsylvania S. V. R. Co.* v. *Cleary*, 125 Pa. 442, 452, 17 Atl. 468, 470:

> The jury are to value the tract of land, and that only. They are not to determine how it could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot. A speculator or investor in deciding what price he could afford to pay, would consider the chances and probabilities of the situation as then actually existing. A jury should do the same thing. They are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in. This is a rule that is well settled * * *.

The primary reason for the exclusion of evidence based upon the prospective sale price of individual lots after subdivision is that it assumes a state of facts which does not exist and consequently leads the jury astray. The rule permitting consideration of the best use for property does not mean that it is to be valued as if it were now used for such purpose. The prospective use is to be considered simply "to the full extent that *the prospect of demand* for such use affects the market value." *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *Foster*, 131 F. 2d 3, 5–6

(C. C. A. 8), certiorari denied, 318 U. S. 767. Thus, in the present case, the jury was to value 331 acres of sugarcane land, considering its availability for subdivision purposes to the extent that the probable demand for such use affected the market value. There is a vast difference between a tract of agricultural land potentially valuable for a subdivision and the same tract of land after the real estate development has been successfully completed and the lots sold or rented. To convert farm land into residence property the land must be graded and filled. A portion of the land must be set aside for streets. Streets must be laid out and constructed, the consent of municipal authorities having been obtained. Sidewalks must be built. Water, sewage, electric lines and other utility systems must be constructed. And even more important than these physical improvements is the stimulation of demand which often requires the promoter, not only to advertise his subdivision widely, but, especially on large subdivisions, to provide retail stores and similar services (see R. 375).

Respondents' witnesses valued the land as if the promoter had successfully made these improvements. For example, they envisaged division of Lot D into two tiers of lots 60 feet by 150 feet with a street between, put a sales price or rental value on each lot and added them up to get the total (R. 197, 199–200, 210–211, 242, 261,

344–345). Such evidence "furnishes no proper measure of value, so far as the land appropriated is concerned, with which alone the jury has to do, and is well calculated to mislead the jury by furnishing a false and fanciful measure of damages." *Kansas City and Topeka Ry. Co.* v. *Splitlog*, 45 Kan. 68, 73, 25 Pac. 202, 204. Similarly, unimproved land may not be valued as if it were improved by a residence or industrial building, for "testimony as to what would be the fair rental value of the land with a suitable and proper building upon it related to mere matter of opinion as to the future, not of present fact, and was too prospective and indefinite in its nature to be competent evidence of the present value of the land, not built upon." *Burt* v. *Wigglesworth*, 117 Mass. 302, 306.

Such testimony should be rejected because it leads to speculation and collateral issues. Real estate developments are notoriously hazardous enterprises, and the cost of the unimproved land generally constitutes only one-third to one-fifth of the ultimate return if the promoter's hopes are realized (R. 258–259, 266–267, 373–374). Miscalculation of the demand is perhaps the most frequent cause of failure of such developments. Thus many promoters, like the respondents here, think that there is a certainty that a sufficient demand will exist when the project is completed but are disappointed because they have been too optimis-

tic or because intervening circumstances, such as changed economic conditions, have destroyed or diminished the demand. The speculation as to demand has particular importance here for the valuations contemplated sale or lease of lots five or six years in the future (R. 218–219, 248–249, 353). Russell, who represented all of the trustees (R. 340), assumed that the demand would permit disposal of the lots in 1945 or 1946 "without advertising, without effort, without paying any brokers" (R. 353). This sanguine view of the future was a prerequisite of respondents' valuations, because, as Castro admitted, at the date of taking in 1940 only "one-third of [the land] would be absorbed for homes" (R. 169).[4]

The valuations involved many other speculative elements such as the expense of physically improving the land by streets, sidewalks, utilities, etc. Thus, Castro testified (R. 170): "It would require special negotiation and systematic and intelligent financing in order to develop the area as a whole into a community section which in a

[4] For this reason, it is questionable whether any evidence as to alleged residence value of much of the property was admissible. Such evidence is permitted only if the property is "needed or likely to be needed in the reasonably near future." *Olson* v. *United States*, 292 U. S. 246, 255. Russell frankly recognized (R. 353) that "Some of those lots would be years off before they would be put on the market at all." Cf. *United States* v. *Foster*, 131 F. 2d 3 (C. C. A. 8), certiorari denied, 318 U. S. 767; *Hall* v. *Delaware, L. & W. R. Co.*, 202 Pa. 292, 105 Atl. 98.

reasonable period of time would be absorbed by the people in the market," and Russell spoke of the "hundreds of thousands of dollars" which would have to be spent for the development of roads, streets, and sewers (R. 352). Russell gave Lot D, which is nearest the navy yard, a lower relative value than another parcel because there would be greater expenses per acre of usable land (R. 327). In *Greenfield* v. *City of Philadelphia,* 282 Pa. 344, 354, 127 Atl. 768, 772, the court held that the value of office space per square foot in a building not yet erected was irrelevant to value of the land, stating: "There necessarily would be so many factors to be taken into account in determining what the net avails would be to the owner from the rents that the result of any determination reached from testimony as to what the rentals might be would be speculative in the extreme." And in *Matter of City of New York (Blackwell's Island Bridge),* 118 App. Div. 272, 274, 103 N. Y. Supp. 441, 443–444, the court reversed a determination of value because of the admission of testimony as to the rental value of apartments which might be erected on a vacant lot, stating: "This was clear error. It involved so much of the elements of uncertainty and speculation as to be inadmissible as proof of any fact."

The instant case involves conjecture to a much greater degree. Not only must assumptions be made as to the various expenses involved in subdividing

but the whole process hinges on a conclusion that conditions five or six years in the future will justify such expenditures. Such speculation will obviously lead the jury far afield from the question they are to determine, i. e., present value of the 330 acres of sugar-cane land. Cf. *Olson* v. *United States,* 292 U. S. 246, 257. The calculation employed by the experts have the semblance of mathematical certainty, whereas in truth they represent "at best, a guess by informed persons." *United States* v. *Miller,* 317 U. S. 369, 375. The jury, mislead by this appearance of mathematical exactness, gives too much weight to the resulting valuations. That the jury was misled in the instant case is evident from the fact that, having failed to reach a verdict in nine hours, a juror requested repetition of the instructions "with regard to the value of the properties within a restricted period" (R. 435). Like the landowner in *Tallman* v. *Met. El. R. R. Co.,* 121 N. Y. 119, 125, 23 N. E. 1134, 1135, who was permitted by the trial court to value vacant land as if it were improved, respondents have been permitted "to have all the advantages which [they] could derive from keeping [their land] substantially vacant and ready to sell as such, and at the same time to have all the advantages, without the investment of any money and without any risk, which [they] could have derived from their improved condition."

B. *Agricultural land may not be valued by capitalizing the estimated net income which might be earned after subdivision into lots.*—Valuations based upon estimated future profits from a business, present or prospective, on property condemned are almost uniformly rejected by the courts in eminent domain proceedings. *United States* v. *Meyer,* 113 F. 2d 387 (C. C. A. 7) (farm income), certiorari denied, 311 U. S. 706; *United States* v. *Davis,* 41 F. Supp. 595 (E. D. Tenn.) (farm income); *San Diego Land & Town Co.* v. *Neale,* 88 Cal. 50, 25 Pac. 977 (projected power project); *City of Stockton* v. *Vote,* 76 Cal. App. 369, 244 Pac. 609 (projected power project); *East Bay Municipal Utility Dist.* v. *Lodi,* 120 Cal. App. 740, 8 P. 2d 532 (projected power project); *Hamilton* v. *Pittsburgh B. & L. E. R. Co.,* 190 Pa. 51, 42 Atl. 369 (prospective bottling business); *Koesler* v. *Pittsburgh Ry. Co.,* 208 Pa. 50, 57 Atl. 66 (existing but not operating salt business); *Sparkill Realty Corp.* v. *State,* 268 N. Y. 192, 197 N. E. 192 (quarry); *Tacoma* v. *Nisqually Power Co.,* 57 Wash. 420, 107 Pac. 199 (projected power project); *Laureldale Cemetery Co.* v. *Reading Co.,* 303 Pa. 315, 323, 154 Atl. 372, 374 (future cemetery). But cf. *United States ex rel. T. V. A.* v. *Powelson,* 118 F. 2d 79 (C. C. A. 4), reversed on other grounds, 319 U. S. 266.

Valuations based on predicted rentals which might be realized after vacant property is improved are likewise rejected. *Burt* v. *Wiggles-*

worth, 117 Mass. 302 (fair rental value of vacant land if improved with suitable building); *Greenfield* v. *City of Philadephia*, 282 Pa. 344, 127 Atl. 768 (rental value of office space in building not yet erected); *Pullman Co.* v. *Chicago*, 224 Ill. 248, 79 N. E. 572 (rental of building not yet erected); *New York Central R. R. Co.* v. *Maloney*, 234 N. Y. 208, 137 N. E. 305 (estimated royalty under lease of non-existent brick business); *Matter of City of New York (Blackwell's Island Bridge)*, 188 App. Div. 272, 103 N. Y. Supp. 441 (rental of buildings, not yet erected); *Gage* v. *Judson*, 111 Fed. 350 (Conn.) (probable rental value or profits from office building not yet erected); cf. *Egan* v. *City of Philadelphia*, 108 Pa. Super. 271, 164 Atl. 813 (estimated rental for exhibition purposes). Such income is irrelevant in condemnation proceedings because it does not measure the value of the land and property actually taken. In most cases, only the land and the permanent improvements thereon are taken. The income derived from the business conducted on the property cannot be attributed solely to the real property. It is the result of all of the property and personal services used in producing the income and indicates the value of the business, not the property used in the business. See Orgel, *Valuation under Eminent Domain* (1936) secs. 154–157, 161, pp. 520–525, 529–536. As the court stated in *Matter of City of Rochester (Smith St. Bridge)*,

234 App. Div. 583, 587, 255 N. Y. Supp. 801, "It is the land which is appropriated, and not the business conducted thereon."

In the instant case the rentals which were capitalized represented the income on the subdivision development and not merely the land. The value of the land would constitute only a small part of the completed development which would be produced by construction of the various improvements. See *supra*, pp. 15, 16. The return from the completed subdivision would include income on the investment in the improvements and upon the personal services of the promoter. But the Government condemned simply the unimproved land. Hence the net income after deduction of current expenses such as taxes, water charges, etc. (see R. 194), cannot be wholly attributed to the land. The personal services furnished by the promoter are of particular importance because success or failure of a subdivision largely depends upon his skill. At least some of respondents' witnesses sought to avoid this objection by allocating the income between the land and the other factors which would produce the income. The details of this allocation do not appear, but Russell stated (R. 319):

> No, I reached that by a rather complicated figuring. We took the cost, and I might say it is a fairly well known cost from our past experience, of developing that land, putting in the developments re-

> quired. We have charged interest on that; we have charged depreciation on those costs, and the figure I have given you represents the capitalization of the net income after those have been deducted.

Thus, all of the net income was attributed to the land "after deducting service charges on the improvements" (R. 321). Such a method of allocating the income disregards the fact that the return is due just as much to the improvements and the promoter's services as it is to the land.[7] Cf. Schmutz, *Condemnation Appraiser's Handbook* (1938) pp. 11–12.

A second reason for exclusion of capitalization of estimated income or predicted rents is the highly speculative nature of such process. Respondents' predictions as to rentals involves the supposition that the subdivision will be successful so as to produce such rentals. Their witnesses assumed that general business conditions and the situation in the neighborhood of the property condemned would, five or six years in the future, permit leasing without any advertising or sales expense. Assumptions were also made as to the cost of improvements and the

[7] Successful subdivision usually produces an enhancement above the aggregate of the cost of land, cost of improvements and the cost of promoter's services. It is the hope for such enhancement which probably leads promoters to undertake such projects. Russell's method results in allocating all of the enhancement to the land alone.

amount of all other expenses involved in subdividing. Having made all of these assumptions, they capitalized at a rate of 4% to 5%.

The proper rate of interest to be used in capitalization is extremely important for a change from a 6% rate to a 5% or 4% rate will produce a 20% or 50% increase in value. To support their choice of a 4% to 5% rate, respondents introduced testimony that trust investments would return between 3% to 4% but the witnesses admitted that they were not qualified to advise on the rate of return on unimproved real estate which they considered to be speculative and therefore demanding a higher yield (R. 236–238, 306–309). So also the court excluded the Government's offer to prove that the Bishop Estate employed a 6% rate on its subdivision (R. 184–186). If a capitalization method were to be used, this collateral question as to the proper rate of interest would have to be fully investigated. And the untrained jury does not have the experience to pass upon such a question. Cf. Orgel, *Valuation under Eminent Domain* (1936) sec. 160, p. 529; Schmutz, *Condemnation Appraiser's Handbook* (1938) pp. 149–152.

Because of the many assumptions and collateral issues which would be introduced it is clear that a capitalization of predicted rentals from a hypothetical subdivision would be too untrustworthy to be of assistance in determining present market

value. The court said in *Greenfield* v. *City of Philadelphia*, 282 Pa. 344, 355, 127 Atl. 768, 772:

> Net rentals of an entire building might be of some assistance in determining its value from the income-producing standpoint, but to permit a witness to testify as to the market value of office space on the upper floors of a building on the lot in question, yet to be occupied by tenants, or to the market value of office space of other buildings in the vicinity, would get the jury out into the wildest realms of speculation on the question of the market value of the property.

All of the factors in respondents' process, which Russell characterized as "rather complicated figuring" (R. 319), were estimated. An apparently small change in any of these items would produce a great difference in the total valuation. Thus, Schmutz in discussing the application of a somewhat similar process to an existing building states (*Condemnation Appraiser's Handbook* (1938) p. 12):

> * * * the slightest change in the amount of the net income may make a great change in the value reflected. For example, a 10 per cent increase in the gross income may bring about a doubling in the net income to the land, with a consequent doubling in the capitalized land value. It is not uncommon to find a difference of 10 per cent in the net income which is wholly attributable to management.

In *Sharp* v. *United States,* 191 U. S. 341, this Court sustained the exclusion of offers to purchase or lease farm land for hotel, residential, or other purposes, stating (p. 348): "Pure speculation may have induced [the offer], a willingness to take chances that some new use of the land might in the end prove profitable."

In approving the exclusion of business profits as evidence of value, Orgel, *Valuation under Eminent Domain* (1936) states (sec. 173, p. 559):

> The courts have taken the proper course in avoiding this kind of valuation wherever possible because in the hands of unskilled jurors and judges on the one hand and of biased experts, on the other, there is no effective check on the value placed on properties by means of capitalization of earnings.

Neither *North American Telegraph Co.* v. *Northern Pac. Ry Co.*, 254 Fed. 417 (C. C. A. 8) nor *United States* v. *Shingle,* 91 F. 2d 85 (C. C. A. 9), the only authorities cited by the court below (R. 462), supports its conclusion. Those cases merely stand for the proposition that the capitalization of rentals accruing *from existing leases* is some evidence of value. In *McCandless* v. *United States,* 74 F. 2d 596 (C. C. A. 9), the court below held that opinions largely based on capitalization of rentals from existing leases on neighboring lands were inadmissable. The principal authority cited was *Pullman Co.* v. *Chicago,* 224 Ill. 248, 79 N. E. 572, where the court sus-

tained a verdict which completely disregarded valuation of vacant property based upon rentals the witnesses estimated would accrue from buildings erected thereon. This Court, in reversing on other grounds, stated (*McCandless* v. *United States*, 298 U. S. 342, 348):

> We find no reason to differ with the holding of the court below as to the inadmissibility of evidence respecting the rent paid for other lands.

Certainly, the evidence in the present case based upon the predicted rentals which might accrue after subdivision is much more speculative than the capitalization of existing rentals upon neighboring property excluded in the *McCandless* case.

C. *The fact that the experts stated that a willing buyer would use the method they employed does not render the evidence admissible.*—The court below admitted that valuation by capitalization of estimated rentals from an assumed subdivision involved "several variables" (R. 462). The only reason advanced to justify such a speculative process was the witnesses' assertions that a willing buyer would employ such a method. But plainly the mere fiat of experts does not prove the fact nor render speculations admissible. As Nichols states (2 Nichols, *Eminent Domain* (2d ed. 1917) sec. 445, p. 1171):

> The trial court cannot be too careful in excluding evidence of this character, as witnesses can always be found who will,

> in their imagination, cover the most hopelessly unmarketable vacant land in the neighborhood of a large city with apartment houses filled with desirable tenants. * * *

The ruling of the court below would deny judicial review of the testimony of any valuation expert no matter how incompetent or irrelevant it might be. For example, it is obvious that the courts will not permit evasion of the rule of *United States* v. *Miller*, 317 U. S. 369, by the expert's assertion that the willing buyer would consider enhancement arising from the project. All the authorities rejecting valuations based on predicted profits or estimated rents (*supra*, pp. 20–21) refute the reasoning of the court below, for the evidence is most frequently, if not invariably, offered by means of expert testimony.

This is not a case where the experts in reaching their opinion as to value used this process in conjunction with various other indicia of value. The fact that, in the course of his investigation, the expert became informed of various matters which would not be admissible in evidence such as tax assessments, offers, etc., does not necessarily lead to exclusion of his opinion. However, if the opinion is largely or completely based on inadmissible considerations, it is likewise inadmissible. *McCandless* v. *United States*, 74 F. 2d 596, 602–603 (C. C. A. 9), reversed on other grounds, 298 U. S. 342; *Atlantic Coast Line R. Co.* v. *United States*, 132 F. 2d 959, 963 (C. C. A. 5);

Orgel, *Valuation under Eminent Domain* (1936) secs. 131, 162, pp. 446–449, 536–539. Otherwise the rule excluding the evidence would be meaningless. Certainly, the fact that the method was employed by "experts"[8] in the instant case did not alter the speculative nature of the valuations.

Respondents' witnesses based their valuations solely on the capitalization of rentals or the estimated sales price of the lots after subdivision. The only mention of any other criterion of value is Castro's statement that his valuation was also based on fee simple prices (R. 179). However, he evaded an answer to questions designed to elicit what sales he was referring to (R. 180) and it is evident from his entire testimony that he used the same method as did respondents' other witnesses. Plainly, all of these opinions were admissible only on the assumption that the method of valuation the witnesses used was a proper measure of market value.

The result of admitting in evidence any valuation process which the expert states that a landowner would use would have important consequences at the present time when the Government is engaged in condemning some 8,000,000 acres of land for national defense and other purposes. The Government is repeatedly confronted with attempts of private landowners to inject into the

[8] Russell did not have any special knowledge as an expert. His testimony was admitted solely because he was one of the owners of the property (R. 313).

valuation proceedings grandiose plans for the development of unimproved property, the value to be determined by the capitalization of prospective profits or by the estimated prices of individual lots in a hypothetical subdivision.

II

ELEMENTS OF VALUE DUE TO A LANDOWNER'S MONOPOLY OF UNDEVELOPED LAND SHOULD BE DISREGARDED IN AWARDING JUST COMPENSATION FOR THE TAKING OF A PART THEREOF

In addition to the 331 acres of land here condemned the Damon Estate owns a large quantity of land in the neighborhood which is either undeveloped or is used for raising sugar cane. Thus the lease to the Honolulu Plantation Company embraced 1,451 acres (Defendant's Ex. 2 orig.; R. 312) and although the total acreage of the estate's land does not appear, it extended from two to two-and-a-half miles along Dillingham Boulevard (R. 174, 253, 317). All of this land was potential residence property to the same extent as was the land condemned (R. 174, 253). However, in concluding that the land condemned could be successfully subdivided, the witnesses assumed that the estate would withhold from competition all of the rest of this large area (R. 225–227, 253–254, 351–353).

This assumption was an essential part of the values claimed by respondents. Their witnesses refused to state to what extent competition would

reduce their estimates (R. 254–255, 351–353). Obviously, the release of more than 1,100 acres to competition would substantially diminish if not completely remove the possibility of successfully subdividing the 331 acres.[9] As Kearns expressed it (R. 254), "we had in mind that it had a greater value to the present owners than to anyone else." In *United States* v. *Miller,* 317 U. S. 369, this Court reemphasized the rule that such values may not be included in just compensation, stating (p. 375):

> Again, strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case, as where the formula is attempted to be applied as between *an owner who may not want to part with his land because of its special adaptability to his own use,* and a taker who needs the land because of its peculiar fitness for the taker's purposes. *These elements must be disregarded by the fact finding body in arriving at "fair" market value.* [Italics supplied.]

It is clear that a willing buyer would not pay an increased value for the 331 acres on the as-

[9] Russell's subdivision contemplated a larger number of lots than there were houses constructed in all of Honolulu in either 1940, 1939, 1938, or 1937. In those years between 1,000 and 1,600 dwelling units were built (R. 372–373; see also R. 175–176) while Russell divided the land into some 1,531 lots (R. 345, 353).

sumption and without assurance that respondents would withhold their other lands from competition. No reason appears why the Government should be required to pay such monoply prices, especially when there is nothing to prevent respondents from immediately subdividing their other lands.

Apparently the court below thought that the charge to the jury cured this error (see R. 461). But this element was essential to respondents' valuation process. The witnesses refused to estimate to what extent competition would reduce their estimates. Hence, the jury had no basis from which to determine whether any subdivision would have been possible if competition existed or, if so, to determine the amount by which the valuations should be discounted. Thus, it is quite possible that, excluding the monopoly, the respondents' valuations would not have been very much higher than those of the Government. The witnesses' opinions lacked probative value and should have been excluded. Under these circumstances, the instructions to the jury could cure the error only by plainly telling the jury to disregard the opinions or, at least, that elements of value attributable to the estate's monopoly must be disregarded. No such instruction was given. Rather than plainly excluding monopoly value, the instruction permitted the jury to include this

element in its verdict."[10] Cf. *Maytag* v. *Cummins*, 260 Fed. 74, 82–83 (C. C. A. 8); *Harkins* v. *Brown*, 108 Fed. 576 (C. C. A. 4). And the fact that the verdicts closely approached the estimates of Harrison and Kearns (within 20%) persuasively indicates that the jury did include this element in the awards (see R. 461).

III

THE JUDGMENTS INCLUDE ENHANCEMENT OF VALUE RESULTING FROM THE PROJECT FOR WHICH THE LANDS WERE TAKEN

The expansion of the naval and military base at Pearl Harbor and Hickam Field was one of the most important projects in connection with the national defense program. An integral part thereof was the securing of housing for military and civilian personnel. Other negotiations having failed, authority was granted to condemn a site for such purpose and an appropriation to pay for the site was included in the Act of May 25, 1939, 53 Stat. 757, 774. The hearings upon this Act make it plain that the appropriation was made in order to acquire the specific lands condemned in this case (see Appendix *infra*, pp. 37–39)

[10] The charge stated (R. 428) "you are not bound to assume that the Trustees of the Damon Estate would not release any of the lands in the immediate vicinity from their present status."

Moreover, it is equally plain that respondents' witnesses based their estimates largely upon the greatly increased demand resulting from the expansion program undertaken in 1939 (R. 205, 239–240, 285–291, 315, 320, 326). The trustees of the Damon estate had a long-range plan for development of the large area they owned on which the lands condemned came fifth or sixth."[11] However, the lands condemned were advanced on the list because of "the tremendous amount of development work going on at Hickam and Pearl Harbor" (R. 318). Thus, there can be no doubt that the verdicts include enhancement of value because of the expansion of the military base occurring after the specific appropriation was made and the condemnation of these lands was authorized.

Moreover, all of respondents' valuations assumed that the sale or leasing would occur, not at the date of taking in 1940, but five or six years in the future (R. 218–219, 248–249, 346). And they assumed, not merely a continuance to 1946 of the demand caused by the tremendous national defense development, but rather they thought "the land is certain to increase in value

[11] The first four subdivisions under this plan were developed in 1924, 1929, 1933, and 1938 (R. 271–272, 283–286). All of these developments over the 16-year period, totaling 321 acres (R. 271, 284–286), were located in the direction of Honolulu rather than towards Pearl Harbor (R. 342–343; see Government's Ex. C. orig.).

there" (R. 319; see also R. 263–264, 270). In fact, Russell testified as follows (R. 345–346):

> Q. Did you assume that the market as of November, 1940 was going to continue?
>
> A. We thought it was going to accelerate very rapidly.

The method of valuation employed here has thus resulted in compelling the Government not only to pay enhancement occurring between the date the Government was committed to the project and the date of taking but also enhancement which respondents expected the Government's demand for housing would cause in the future. This case, therefore, falls squarely within the rule of *United States* v. *Miller*, 317 U. S. 369. Cf. *United States* v. *Rayno*, 136 F. 2d 376 (C. C. A. 1), certiorari denied October 25, 1943 No. 351, this Term.

Both the trial of this case and the hearing in the circuit court of appeals having occurred prior to this Court's decision of the *Miller* case, this question was not presented in the courts below until the petition for rehearing was filed. In response to the order of the court below of February 6, 1943 (R. 468–469), a memorandum was submitted setting forth the facts which demonstrate the applicability of the *Miller* decision. However, the petition for rehearing was denied (R. 464). *In Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, this Court reversed a judgment for

failure of the circuit court of appeals, in applying the rule of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, to consider a reversal of the local law which occurred after the trial court's judgment was entered. Compare *Hormel* v. *Helvering*, 312 U. S. 552, 557. The judgments in the instant case charge the Government with elements of value which the public should not, in fairness, be required to pay. In the circumstances of this case, the failure of the Government to raise the issue specifically at the trial should not require payment of enhancement occurring after May 25, 1939.

CONCLUSION

It is respectfully submitted that the judgment of the circuit court of appeals should be reversed.

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NOVEMBER 1943.

APPENDIX

Comparison of testimony of Rear Admiral Ben Morreel, Chief of Bureau of Yards and Docks on April 5, 1939 before House Subcommittee on Appropriations (page 416 of Hearings) with facts in the record.

Testimony	*Facts in Record*
NAVY YARD, PEARL HARBOR, HAWAII	
PURCHASE OF LAND	
Mr. FERNANDEZ. The first item is $165,000 for the purchase of land at the Navy Yard, Pearl Harbor, Hawaii.	
Admiral MORRELL. This project was authorized by the act of June 25, 1938.	
The Pearl Harbor Navy Yard is the principal outlying naval base of the United States and is a most important activitiy for the repair, upkeep, and support of the United States Fleet in the Pacific. The area of the naval base is limited and there is not sufficient land for the development of housing areas for industrial civilian personnel and enlisted personnel.	
The housing situation in the vicinity of Pearl Harbor is acute and efforts have been made through the Federal Housing Administration to secure low-priced housing for officers, enlisted, and civilian personnel. To date	Russell testified he knew the Navy was interested in having the Damon Estate erect a series of low costs to relieve the housing shortage at Pearl Harbor (R. 337).

Testimony	*Facts in Record*
no satisfactory solution has been reached and it appears impracticable to obtain the needed housing by reliance on private parties.	
This project contemplates the acquisition of a tract of land adjacent to the navy yard, to be developed as funds become available, for housing of the various classes of personnel attached or assigned to the station. It is proposed that this area be developed to meet the immediate needs to relieve the present acute housing situation, with provision for future expansion in time of emergency.	Russell testified the urgent demand for the lot just outside the navy yard gate had been present for a year and a half before November 1940, i. e., about June 1939 (R. 318). He also stated that Army and Navy activities particularly affected the demand for this lot (R. 320).
The area contains about 350 acres.	The lands condemned total 331.756 acres (R. 22, 42).
Mr. FERNANDEZ. Did that authorization contemplate the utilization of this land for civilian employees?	
Admiral MOREELL. Yes, sir.	
Mr. FERNANDEZ. Has there been an expansion of the civilian personnel there recently?	
Admiral MOREELL. Not in the immediate past; no, sir.	
Mr. FERNANDEZ. Is there any other land in this immediate vicinity that is suitable for quarters?	The land adjoins Pearl Harbor and Hickam Field. See map, Ex. G, original.
Admiral MOREELL. No, sir.	
Mr. FERNANDEZ. How do you arrive at the figure of $165,000?	The deposit for land and improvements of $157,369.94 (R. 22, 57) equals about $474 per acre. $165,000 for 350 acres equals about $471 per acre.
Admiral MOREELL. That is a figure estimated by the Commandant. The land belongs to several estates, and I understand that by the	

Testimony	*Facts in Record*
terms of the trusteeship they are not allowed to quote a price. I have here a statement from the Commandant, from which I quote as follows: It was evident, from negotiations with owners of these parcels, that they were very reluctant to fix definite prices for the parcels in question. The Commandant is of the opinion, however, that the amount of $165,000 is sufficient to cover all of the tracts proposed to be purchased. An area of 244 acres is classed as cane land, 48 acres are classed as pasture land, 72 acres as fishponds and waste lands, and approximately 1½ acres are classed as semi-commercial lands. The average price per acre approximates the price awarded in condemnation proceedings for land of high potential value for agriculture. That would approximate the price paid by the Army for Hickam Field, or $441 per acre.	Russell, one of the trustees of the Damon Estate certified that in 1939 and 1940 negotiations were had with the Navy Department relating to a housing development (R. 326, 335–337).

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 209

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN WATERHOUSE, ERNEST HAY WATERHOUSE, WALTER FRANCIS FREAR, AND JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I

THE PROCEDURAL CONTENTIONS BY WHICH RESPONDENTS ATTEMPT TO SUPPORT THE JUDGMENT ARE WITHOUT MERIT

A. *An opinion of value largely based on inadmissible considerations cannot be justified because the facts showing the improper basis of the opinion were elicited on cross-examination.*—Respondents make repeated reference in their brief to the fact

that the considerations upon which the valuation opinions of their witnesses were founded were brought out by the Government on cross-examination (see Br. 1, 4, 5, 12, 13, 14, 59) and argue that the admission of such evidence is therefore not error (Br. 43–51, 55–56). They assert that "A party who himself elicits testimony cannot object to its admissibility" (Br. 46).

On the contrary, the universal rule in condemnation proceedings is that when cross-examination shows that an expert has based his opinion of value upon an erroneous method of valuation or upon inadmissible considerations, his direct testimony must be stricken.[1] The rule advocated by respondents would result in prohibiting any judicial review of the methods of valuation employed by expert witnesses and even of the standard of value they might apply. This is so because the usual practice is on direct examination simply to qualify the witness as an expert and then inquire as to his opinion of value. The considerations which led him to reach that opinion are rarely developed on

[1] The following cases are illustrative of this rule: *San Diego Land & Town Co.* v. *Neale*, 88 Cal. 50, 62–63, 25 Pac. 977 (1891); *Spring Valley Water-Works* v. *Drinkhouse*, 92 Cal. 528, 28 Pac. 681, 682–683 (1891); *Stockton* v. *Ellingwood*, 96 Cal. App. 708, 716, 275 Pac. 228, 232 (1929); *Maher* v. *Commonwealth*, 291 Mass. 343, 348–349, 197 N. E. 78 (1935); *Pierce County* v. *Duffy*, 104 Wash. 426, 176 Pac. 670 (1918); *Central Georgia Power Co.* v. *Stone*, 139 Ga. 416, 77 S. E. 565 (1913); *Hamilton* v. *Pittsburgh B. & L. E. R. Co.*, 190 Pa. 51, 42 Atl. 369 (1899).

direct examination but are left for opposing counsel to bring out on cross-examination. Consequently, facts showing that, because a faulty foundation has been used, the opinion is not admissible or that the opinion includes items of value which may not be included in the award almost always appear from cross-examination rather than on direct.

For example, in *Maher* v. *Commonwealth,* 291 Mass. 343, 197 N. E. 78 (1935) an owner on direct examination gave his opinion of value. On cross-examination it appeared that he based this opinion on what real estate experts had told him and upon sentimental considerations. The appellate court reversed because of failure of the trial court to strike this opinion. Acceptance of respondents' contention would permit such an opinion to be considered in determining market value. Similarly, landowners would be permitted to recover enhancement of value due to the Government project, despite this Court's decision in *United States* v. *Miller,* 317 U. S. 369, by the simple expedient of omitting mention of such enhancement during direct examination.

Respondents suggest no reason why such a rule should be adopted. Nor do the decisions cited (Br. 46, 55) tend to support the contention. None of these cases relates to condemnation proceedings nor to any type of proceeding involving valuation of property. In fact, only one case

Fidelity & Casualty Co. v. *Griner*, 44 F. 2d 706 (C. C. A. 9) (Br. 46, 55) concerned an expert witness and, in that case, the medical expert's opinion had been stricken by the trial court on the ground it was based on hearsay evidence and upon evidence not before the jury. Moreover, the Government is not, as respondent suggests (Br. 46), objecting to the answer the witnesses gave to the questions upon cross-examination. It is accepting those answers as true and insisting that they show that the opinions of value given upon direct examination were founded upon improper considerations, and hence should have been excluded from consideration by the jury.

The proper procedure to follow in such circumstances is summarized in *Central Georgia Power Co.* v. *Stone*, 139 Ga. 416, 77 S. E. 565 (1913) where cross-examination showed that two experts as to value had estimated profits that might be made after improving the property and then based their estimate of market value by prorating the contribution of the landowner to the total result. The court in holding that such evidence should be stricken said (139 Ga. at 420):

> If it were sought to prove such facts for the consideration of the jury, the evidence would be rejected. If a hypothetical question were framed with such facts as a basis for an opinion as to value, the question would be ruled out on objection, because such facts would be illegal and inadmissible.

> So when the witness shows that his opinion is founded on such illegal facts, the opinion is inadmissible.

Respondents do not directly challenge the Government's statement (Br. 27–30) that the mere assertion by the expert that a willing buyer would use the method he employed does not render the evidence admissible. However, the contention that facts appearing on cross-examination must be disregarded in determining admissibility is, in essence, the same contention, for owners do not ordinarily bring out the basis of the expert's valuation on direct examination, and certainly the respondents would deny that the Government might compel such a showing on direct.[18] Both contentions are erroneous for the same reason, i. e., they attempt to make the experts' definition of market value and their notion of the elements that should be considered in determining value conclusive upon the courts.

B. *The presentation by the Government of evidence to rebut the testimony to which its objections had been overruled and its motions to strike denied did not waive such objections.*—Respondents' brief refers many times to the fact that the Government presented evidence concerning the experience of other subdivisions, rates of interest to be used in capitalizing, and similar testimony to rebut

[18] For example, in Hawaii, as in California and some other States, similar sales may not be brought out during direct examination of an expert but may be developed during cross-examination.

respondents' evidence (Br. 3, 17–18, 21, 40, 45, 55–56, 57, 61). They assert (Br. 56): "Error in the admission of evidence offered by one party is cured by the act of the adverse party in offering the same evidence or bringing it out on cross-examination."

The contention is, in effect, that the objecting party, after his view of the law has been rejected by the trial court, must elect whether to insist upon his own theory, withhold his rebuttal evidence and thus waive his opportunity of securing a favorable verdict despite the alleged error or, alternatively, to waive his right to review the ruling by presenting rebuttal evidence in the hope that the jury's conclusion will be favorable. An objecting party is not compelled to make any such election. In *Salt Lake City* v. *Smith*, 104 Fed. 457 (C. C. A. 8), the court discussed this subject at length and concluded (p. 471):

> One who objects and excepts to an erroneous ruling which permits his opponent to present improper evidence does not waive or lose his objection or exception, or his right to a new trial on account of it, by his subsequent introduction of the same class of evidence in support of his case.

Cf. *McCandless* v. *United States*, 298 U. S. 342, 347; *Grand Trunk Pac. Ry. Co.* v. *Tollard*, 286 Fed. 676 (C. C. A. 8). The cases cited by respondents (Br. 56) have no tendency to show that in the instant case the Government waived the objections which it had repeatedly made, which

had plainly presented the question as to admissibility of respondents' method of valuation, and which had all been overruled. For example, *Fidelity & Deposit Co. of Maryland* v. *Bates*, 76 F. 2d 160 (C. C. A. 8), held that no prejudicial error was committed in overruling an objection to a third person's testimony of a statement made by an individual to a bank examiner since the bank examiner testified to the same effect.

Similarly, the other cases cited by respondents (Br. 56) did not hold that presentation of rebuttal evidence waived the objection but held that when the fact in question appeared from other evidence the error was not prejudicial. Respondents claim (Br. 54, 57) that no prejudicial error occurred at the trial and cite the harmless error statute, Jud. Code, sec. 269, 28 U. S. C. sec 391. To support the assertion that the verdict was reasonable they refer (Br. 55) to opinion evidence which the Government is here attacking. Thus, the argument is premised on resolving in respondents' favor all the issues presented in the instant case. Moreover, the harmless error statute does not permit the appellate court to substitute itself for the jury and determine that, disregarding evidence erroneously admitted, the result is reasonable. As this Court made clear in *McCandless* v. *United States*, 298 U. S. 342, the vital issue in a condemnation proceeding is the amount of just compensation; hence an erroneous ruling as to valuation evidence

"could not be otherwise than prejudicial," 298 U. S. 342, 348. See also *United States* v. *River Rouge Co.*, 269 U. S. 411, 421; *Lynch* v. *Oregon Lumber Co.*, 108 F. 2d 283, 285–286 (C. C. A. 9); *Fort Dodge Hotel Co.* v. *Bartelt*, 119 F. 2d 252, 259 (C. C. A. 8). This is so even if there are proper opinions of value which exceed the amount of the verdict, for "the jury were not bound to accept the estimates of those other witnesses, and it is impossible to say how far the finding may have been influenced by this improper evidence." *Central Georgia Power Co.* v. *Stone*, 139 Ga. 416, 421, 77 S. E. 565; see also *United States* v. *Foster*, 131 F. 2d 2 (C. C. A. 8), certiorari denied, 318 U. S. 767. To compel the appellant in condemnation proceedings to prove affirmatively that the particular error produced a different verdict from that which would have been rendered in the absence of such error would place an impossible burden on such appellant, for "what the verdict might have been in a condemnation suit is entirely unpredictable." *Alabama Power Company* v. *Federal Power Commission*, 136 F. 2d 929, 935 (C. C. A. 5). Consequently, as this Court pointed out in the *McCandless* case, 298 U. S. 342, 347–348, an erroneous ruling on a substantial matter, such as the amount of compensation to be paid for a taking, is ground for reversal "unless it *affirmatively* appears from the whole record that it was not prejudicial" [italics by the Court].

There can be no question that the opinions of respondents' witnesses based upon speculative predictions largely influenced the jury and hence that the error was prejudicial. Nor does the Government's rebuttal evidence cure this error nor remove this prejudice. Therefore, the presentation of such rebuttal evidence did not waive the objections.

C. *The Government's motions to strike the opinions were not defective in form.*—Respondents assert that the Government's motions to strike the opinions of the witnesses were properly denied because they referred to all of the witnesses' testimony (Br. 56). Reliance is placed on decisions applying the general rule that when a witness has testified as to various matters relevant to the issues, a trial court does not err in denying a general motion to strike all his testimony when some of it is proper. This is another aspect of the general principle that counsel may not place upon the court the burden of separating the admissible and inadmissible evidence and that counsel must specifically call the court's attention to the ground of objection so that it may intelligently rule thereon.

The Government's motions conformed to this principle and do not violate the rule sought to be invoked by respondents. As in the usual condemnation proceeding, the single issue in the instant

case was the value of the land taken.[2] The testimony was relevant only insofar as it related to that issue. The Government's objection is that the opinions of such value were inadmissible. Hence, there was no substantial part of their testimony which was admissible. Although respondents assert the contrary they fail to specify the testimony which they claim "was clearly admissible" (Br. 56). In rejecting a similar contention, that a general motion to strike expert testimony was insufficient because the testimony as to the expert's qualifications and experience was proper, the court said in *Pierce County* v. *Duffy*, 104 Wash. 426, 176 Pac. 670:

> The inclusion of proper preliminary testimony does not destroy the efficacy of the motion if the testimony as to value alone should yield to such a motion, directed simply to it, for the reason that the preliminary testimony would be immaterial and unavailing for any purpose except as it is associated with and supports the testimony as to market value.

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[2] The only condemnation case cited by respondents (Br. 56, *United States* v. *Becktold Co.*, 129 F. 2d 473 (C. C. A. 8), concerned a general motion to strike testimony of a witness as to value of a plant including land, the building thereon, and machinery in the plant. The failure to specify the particular testimony to which the motion was directed was considered fatal on the ground that his testimony of value of some of the three items concerned was admissible. The motion did not state in what regard the witness' theory of value was erroneous.

Moreover, the Government's motions were not simply motions to strike all of the witnesses' testimony without specifying any reason therefor. In each instance it was clearly stated that the objection was to the speculative basis of the opinion of value (R. 167–168, 194, 197, 219, 262, 314–315). The motion made at the end of the trial stated the Government's contention at length, quoted from 2 Nichols, Eminent Domain (2d ed. 1917), sec. 445, pp. 1170–1171, and concluded (R. 419), "I, therefore, move that the testimony of these witnesses based upon the capitalization of income, which is based upon an alleged subdivision * * * should be stricken from the record." The court was thus fully informed of the testimony to which the Government objected and the reasons for such objections. There could be no misunderstanding of the Government's position. Under these circumstances, it would be absurd to require the Government to annoy the court and delay the trial by reiterating its view which had been rejected and by repeating the substance of the testimony on each occasion when a motion to strike was made. *Cf. Salt Lake City v. Smith*, 104 Fed. 457, 470 (C. C. A. 8).

D. *The fact that the jury viewed the land condemned did not justify denial of the Government's motions for directed verdicts.*—Respondents refer (Br. 57) to the fact that a jury is not bound by the opinion of value of an expert

and also to the fact that the jury viewed the property condemned. This does not mean that the jurors are entitled to disregard the evidence and substitute therefor their personal opinion as to value. This subject was thoroughly analyzed in *Washburn* v. *Milwaukee & L. W. R. Co.*, 59 Wis. 364, 368, 18 N. W. 328, 330, cited by respondents (Br. 57), where the court concluded:

> We think such value and damages could only be assessed upon the evidence given by the witnesses, and that an assessment outside of the evidence could not be upheld. For instance, if no witness had estimated the compensation to which a plaintiff was entitled at less than $500 or more than $1,000, a verdict for less than $500 or more than $1,000 should be set aside because unsupported by evidence.

The decisions of various state courts are in conflict whether the jury should be told that the view is "in the nature of evidence" or that it is made solely to enable the jury "to understand and apply the evidence."[3] Whichever position is taken, the view alone cannot sustain the award. See Orgel, Valuation Under Eminent Domain (1936), sec. 127, pp. 424–429. In *Forest Preserve District* v. *Folta*, 377 Ill. 158, the court stated the function of the view as follows:

> Where the estimates of expert witnesses as to values are conflicting, the jury may re-

[3] The Hawaiian courts have not passed on this subject.

> sort to an inspection of the premises in order to determine the weight of each opinion, but the verdict will not be sustained, unless it is within the range of the values expressed by the witnesses.

In the instant case the only permissible verdict would be for $137,487.00 if values based upon capitalization of prospective earnings after subdivision of the sugarcane land are excluded. All of respondents' witnesses used such a process. The earnings from other subdivisions (R. 276, 332) are irrelevant for the same reason. Similarly, the price of a sale of 3 acres to the City of Honolulu for school purposes (R. 303)[4] and the lease of 2.25 acres to the Bishop Bank (R. 323) tend to show not value of sugarcane lands, but the value of individual lots after subdivision. Thus, unless the Government's contention is rejected, the only verdict which the evidence would justify would be for $137,487.00. The denial of the motion for directed verdicts was proper, therefore, only if value may be measured by reference to the capitalization of

[4] The admission of this evidence over the Government's objection (R. 301–308) was plainly erroneous. The sale was made to the City of Honolulu, a body possessing the power to condemn, for use as a school site. Under such circumstances, the transaction is a compromise to avoid condemnation rather than a voluntary sale; hence the price is not admissible as evidence of value. *United States* v. *Foster*, 131 F. 2d 2 (C. C. A. 8), certiorari denied, 318 U. S. 767; *United States* v. *Reynolds*, 115 F. 2d 294, 296 (C. C. A. 5); Note, 118 A. L. R. 893–904.

expected earnings from the proposed subdivision of the property.

II

RESPONDENTS' ANSWERS TO THE ARGUMENT MADE BY THE GOVERNMENT IN ITS OPENING BRIEF LACK MERIT

A. *The present value of agricultural land claimed to be adaptable for subdivision purposes may not be arrived at by capitalizing the net income which, in the opinion of witnesses, could be derived from the lands if they were subdivided and leased for dwellings, business places, and truck gardens.*—Respondents "do not find it necessary" to controvert this proposition (Br. 30). They agree that evidence of profits which would be realized from a business conducted or a building erected on the land "does not indicate the present value of the land" (Br. 36).

Nevertheless respondents contend that the witnesses' opinions were properly admitted. They refer (Br. 23) to the statement of the court below that "the witnesses were testifying as to value of the land in November 1940" and the discussion of the evidence relates solely to the direct examination during which the witnesses expressed their opinions of market value. (See Br. 25, 29, 30, 41, 43–44.) The cross-examination made it clear that all of the witnesses based their conclusions solely upon the estimated selling price or rental which might be obtained for the individual lots or farms after subdivision. (See Govt.'s Br. 5–6, 15,

17–18.) The opinion of the court below recognized this fact. It described the method of Castro's valuation as follows (R. 459):

> He arrived at that value by capitalizing at 4% the average rentals of $51.57 per acre *which he said could be obtained by leasing the lots in the subdivision.* [Italics supplied.]

The method employed by the other witnesses was similarly described and as to Russell the court below stated (R. 460):

> He also valued the lands by considering their best use as a subdivision, and by capitalizing, at 4%, *the earnings which he said would be made therefrom.* [Italics supplied.]

Respondents' lengthy statement of the testimony (Br. 9–14) demonstrates the correctness of this description of the evidence.[5]

Nevertheless respondents state (Br. 24):

> The owners at no time contended that the value of the land was to be determined by

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[5] The fact that some of the witnesses purported to allocate the total income from the projected subdivision between the land and the other factors contributing to the total result by making some allowance for promoter's profit, interest on investment, "service charges" on improvements, etc. (Resp. Br. 11–12, 13, 46–47) increases, rather than diminishes, the conjectural nature of the process and does not justify admission of the evidence. See Govt.'s Br. 22–23; *Central Georgia Power Co.* v. *Stone*, 139 Ga. 416, 419, 77 S. E. 565; *Laureldale Cemetery Co.* v. *Reading Co.*, 303 Pa. 315, 154 Atl. 372; *Chatfield* v. *Board of Revision of Taxes*, 346 Pa. 159, 29 Atl. 685; *San Diego Land & Town Co.* v. *Neale*, 88 Cal. 50, 25 Pac. 977.

> estimated sales prices, or capitalized estimated rentals, to be obtained after subdivision, nor did they introduce evidence to that effect.

This assertion can only be justified by entirely disregarding the cross-examination showing the method employed by the witnesses in computing the figures they gave on direct examination. Thus, respondents' entire argument represents merely a statement in different terms of the erroneous contentions that the expert's definition of value is conclusive upon the courts (Gov'ts Br. 27–29) and that opinions of value may not be excluded when cross-examination shows that they were founded upon illegal considerations. (See *supra*, p. 1–5.)

For example, the brief discusses rental value at length (pp. 32–41) and contends that estimated rental value at the date of taking of the lands "in their then condition, but for a different use" was admissible (Br. 31). The argument is that the rental which was capitalized represented the amount for which the entire area of sugarcane lands might be rented to a promoter who would thereafter subdivide. (See Br. 25–26, 29, 30, 43, 50.) Perhaps such construction of the evidence would be possible from consideration of the direct examination alone. But the cross-examination made it perfectly clear that the witnesses were capitalizing the estimated rental from prospective

leases to home owners and truck farmers and not from a prospective lease to a promoter who would sublease after subdividing. Thus, on re-cross-examination, Castro admitted that he "just cut up these lots on this land and gave them a rental value and then arrived at the total figure" (R. 200). Harrison used two different rates of capitalization, "the residence lots of 4% and the area for small farm lands at 5%" (R. 210). The average rental of truck farms which he capitalized was determined by assigning a rental to each farm, adding them up to produce a total rental of the truck farm area, and then dividing by the acreage to produce an average rental per acre (R. 213). Kearns calculated his average rental in the same manner (R. 262). Finally Russell, who valued the entire area for house lots, went through the Trustee's plan for a subdivision and "put a rental value on each lot" (R. 344).

Thus, the question whether value might be based upon a capitalization of the estimated rental which might be obtained on a lease to a promoter who would thereafter subdivide is not here presented. It is difficult to understand why the witness should be permitted to capitalize the rental he estimates a promoter would pay for the entire tract rather than simply express his opinion as to the amount for which the promoter

would purchase the property.* Even assuming that such capitalization would be permissible, it does not justify the process here employed based upon the estimated rentals of lots after the subdivision has been completed. As the Government's opening brief pointed out (p. 15) there is a vast difference between the value of lots in the completed subdivision and the value of the sugar cane land potentially useful for subdivision purposes. The importance of this difference is manifest from the fact that although respondents' witnesses Castro, Harrison, and Kearns assigned residence value to only 10% of the land condemned (cf. Resp. Br. 8, 12, 24), the value of that small area represents half of their total valuation. (See Appendix A, B, *infra*, summarizing all the valuations and breaking down respondents' valuations.) The process of basing the opinions of present value upon the sales price or capitalized rental

* None of the cases cited by respondents (Br. 33, 52–53) sustains the admission, as evidence of the fee value of the land condemned, of valuations based on the capitalization of rents which witnesses estimate might be obtained if the land were put to some more profitable use. See Orgel, Valuation Under Eminent Domain (1936), sec. 184, p. 578. *Egan* v. *City of Philadelphia*, 108 Pa. Super. 271, 164 Atl. 813 (1933) involved condemnation of one year's use of the property; hence rental value was the question to be determined. *Idaho Farm Development Co.* v. *Brackett*, 36 Idaho 748, 213 Pac. 696 (1923), reversed the trial court for admitting evidence of the revenue ordinarily derived from cattle ranches in the vicinity of similar size to the ranch condemned. Most of the cases cited (Br. 33) presented exceptions to the general rule excluding business profits because the nature of the property

of residence lots after subdivision thus results in tremendous inflation of value, exceeding $8,000 per acre in some instances. (See Appendix B, *infra.*) Respondents' truck farm valuations were $130 to $140 less than the jury's award of $800 per acre; hence, the judgments can be supported only by

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valued prevented application of the usual methods of valuation, the courts frequently stating that the property had no market value. Such cases are the following: *Chicago, B. & Q. R. Co.* v. *North Kansas City Develop. Co.*, 134 F. 2d 143 (C. C. A. 8) certiorari denied, 319 U. S. 771 (condemnation by railroad of track and switch facilities); *Northern Pac. R. Co.* v. *North American Tel. Co.*, 230 Fed. 347 (C. C. A. 8), certiorari denied, 249 U. S. 607 (condemnation by telegraph company of right of way for poles over railroad right of way); *Lebanon & Nashville Turnpike Co.* v. *Creveling*, 159 Tenn. 147, 17 S. W. 2d 22 (1929) (condemnation of roadbed, right of way, easements and franchise of toll turnpike); *Sanitary District of Chicago* v. *Pittsburgh F. W. & C. R. Co.*, 216 Ill. 575, 75 N. E. 248 (1905) (condemnation of part of railway terminal in Chicago); *State* v. *Suffield & Thompsonville Bridge Co.*, 82 Conn. 460, 74 Atl. 775 (1909) (condemnation of toll bridge); *Assessors of Quincy* v. *Boston Con. Gas Co.*, 309 Mass. 60, 34 N. E. 2d 623 (1941) (tax valuation of mains, etc., of Gas Company). In *Somers* v. *Meriden*, 119 Conn. 5, 174 Atl. 184 (1934) both parties admitted that under the circumstances the property should be valued by capitalization of earnings.

The Hawaiian tax cases cited by respondents (Br. 52–53) likewise fail to support the argument. For the most part, the tax assessments are based on a different statutory standard of value than that applicable to condemnation proceedings and the property interests to be valued are different. See *Re Taxes Bishop Estate*, 27 Haw. 190, 192–193 (1923); *Re Taxes Bishop Estate*, 13 Haw. 671 (1901), discussing "eight-year rental" rule in assessing leased property. In any event, the cases did not involve rental from a different prospective use.

reliance upon this speculative theory of residence valuation.

Respondents' brief does not, therefore, suggest any reason nor cite any authority to justify the admission of the speculative opinions of their experts.

B. *Elements of value due to a landowner's monopoly of undeveloped land should be disregarded in awarding just compensation for the taking of a part thereof.*—To support inclusion of this element of value, respondents rely upon the erroneous notions that facts appearing on cross-examination must be disregarded in determining admissibility of opinions of value (Br. 59) and that the presentation of rebuttal evidence waives the objections (Br. 60). The assertion (Br. 59–60) that the Government's objection merely goes to the weight and not to the admissibility assumes that such monopoly value might properly be included in the award.

Respondents do not answer the Government's argument that such monopoly value represents special value to the owner rather than market value and cannot be considered. Respondents imply that this objection was not raised at the trial, stating that no motion was made to strike the testimony of the witnesses on this ground (Br. 59, 3). The motion to strike Harrison's testimony on the ground that it "assumes a false set of facts and conditions which does not reflect the true market value tested by the ordinary rule" (R. 228),

and to strike Kearns' testimony on the ground that it was "based on a false premise and is not a test of the market value of the property" (R. 262) plainly embraced the question whether monopoly values could be included in market value. And specific objection was made to the inclusion in Russell's valuation of "a contemplated use of the lands in question with lands of the same owner, it is not material and is not competent in proving market value" (R. 315). Nor did the court, as respondents state (Br. 61), give the instruction to the jury requested by the Government. The Government's requested charge excluded monoply value as follows, "you are not to assume that the trustees of the Damon Estate would not release any of the lands in the immediate vicinity from this present status" (R. 85). The charge given permitted such assumption, and hence permitted the jury to award monopoly value. (See Govt.'s Br. 32–33.)

C. *The judgments include enhancement of value resulting from the project for which the lands were taken.*—Respondents' argument is largely devoted to discussion of the fact that the United States did not raise this question until after this Court decided *United States* v. *Miller,* 317 U. S. 369 (Br. 61–62, 65–66). This defect is not jurisdictional and respondents suggest no reason to justify inclusion of such enhancement in the instant case. (See Govt.'s Br. 35–36.) Respondents' attempt to distinguish the *Miller*

decision on the ground that Pearl Harbor Navy Yard and Hickam Field have been in existence since 1901 and 1933 respectively (Br. 64–65, 6) plainly lacks merit. The Government is not objecting to enhancement which may have occurred when those military installations were first constructed. The objection is to enhancement arising from expansion of this military base as part of the national defense program. Respondents do not deny that the Government's activities did produce such enhancement. In fact they rely (Br. 28, see also Br. 14) on the fact that the Navy approached them in 1939 or 1940 concerning use of the lands for housing and that the lands were taken for housing purposes to support their contention that the best use of the lands was for subdivision purposes. Plainly, the principle of the *Miller* decision that "the owners ought not to gain by speculating on probable increase in value due to the Government's activities" is directly applicable.

The fact that 77 acres, which adjoin Hickam field, were taken for Army housing, while the remainder of the 331 acres was taken for Navy housing, does not justify payment of such enhancement (cf. Respondents' Br. 62). Both the Army air field and the Navy Yard were parts of the military base which has been greatly expanded. No reason can be given for limiting the *Miller* decision to cases where the activities of the particular department for whose use the land has

been condemned produces the enhancement. Such limitation would, in the instant case, deny enhancement of the 254 acres taken for the Navy, but would permit inclusion of this element in the award for the 77 acres taken for Army housing. Above all, respondents have shown no reason why they are entitled to recover for enhancement resulting from a prospective acceleration of the Government's needs four or five years after these suits were instituted in plain violation of this Court's pronouncements in the *Miller* case. Such is the obvious result of respondents' capitalization scheme, for Russell himself admitted that his valuation was based on the assumption that the demand was "going to accelerate very rapidly" in the years immediately following the present takings.

CONCLUSION

It is respectfully submitted that the judgment of the circuit court of appeals should be reversed.

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(APPENDIX A)

Summary of Valuations

	Case No. 434	Case No. 436			Total all Lands
	77.286 acres	Lots C-3-A, C-3-B-1, and C-3-B-3-A 192.936 acres	Lot D—Gore Lot 61.512 acres	Total Case No. 436 254.448 acres	331.734 acres
Government Witnesses:					
Crozier & Fernandez	$33,498.00 (R. 117, 134.) $433 per acre.	$78,706.00 (R. 126, 138.) $407 per acre.	$25,283.00 (R. 126, 138.) $411 per acre.	$103,989.00 (R. 126, 138.) $408 per acre.	$137,487.00. $414 per acre.
Respondents' Witnesses:					
Castro	$70,718.62 (R. 160.) $1,031 per acre.	$227,572.50 (R. 167.) $1,179 per acre.	$70,311.75 (R. 160.) $1,280 per acre.	$300,884.25 $1,206 per acre.	$368,580.66. $1,165 per acre.
Harrison and Kearns	$63,772.35 (R. 309; 346-347.) $825 per acre.	$182,068.00 (R. 200, 343.) $943 per acre.	$63,440.33 (R. 206, 340.) $1,031 per acre.	$245,507.43 $964 per acre.	$309,279.78. $932 per acre.
Russell	$170,279.17 (R. 335.) $2,203 per acre.	$216,134.75 (R. 321.) $1,120 per acre.	$127,931.25 (R. 330.) $2,076 per acre.	$344,065.00 $1,352 per acre.	$514,344.17. $1,550 per acre.
Verdicts	$61,230.40 (R. 32.) $800 per acre.			$238,574.40 (R. 72.) $800 per acre.	$365,404.80. $800 per acre.
Deposits with Declarations of Taking	$33,498.00 $433 per acre.			$123,571.94 (R. 59.) $486 per acre. (Including improvements).	$157,369.94. $474 per acre.

(24)

APPENDIX B

Break-down of Respondents' Valuations

	Castro				Harrison and Kearns				Russell
	Acres	Percent of total		Percent of total	Acres	Percent of total		Percent of total	
Case No. 424:									
Residence lots	4.5 (R. 190)	5	$20,565.00 (R. 191.) $4,548 per acre.	28	4.5	5	$20,250 [1] (R. 518.) $4,500 per acre.	62	
Truck Farms	72.7	94	$48,330.43 (R. 191.) $691 per acre.	61	72.7 (R. 280)	94	$34,172.90 $332 per acre.	32	
Total	77.2	100	$79,715.43 $1,033 per acre.	100	77.2	100	$63,772.55 $825 per acre.	100	$170,279.17. (R. 331.) $2,205 per acre.
Case No. 428:									
Lots C-9-A, C-3-B-1, and C-9-B-3-A:									
Residence lots	14.9 (R. 191)	7	$110,042.50 (R. 191.) $7,385 per acre.	46	14.9 (R. 306)	7	$63,972.36 $4,192 per acre.	33	
Truck Farms	177.9	92	$117,530.00 $660 per acre.	51	177.9 (R. 317)	93	$119,477.64 [2] $671.60 per acre.	66	
Total	192.9	100	$227,572.50 $1,179 per acre.	100	192.9	100	$183,050.00 $943 per acre.	100	$316,134.75. (R. 331.) $1,130 per acre.
Lot D:									
Residence Lots	16.2 (R. 188)	27	$51,177.18 (R. 189.) $3,158 per acre.	64	16.2 (R. 312)	27	$33,311.60 [3] $2,179 per acre.	33	
Truck Farms	45.3	73	$28,134.66 $671 per acre.	35	45.3	73	$28,133.32 $621 per acre.	44	
Total	61.5	100	$79,311.75 $1,289 per acre.	100	61.5	100	$61,449.32 $1,031 per acre.	100	$127,931.25. (R. 330.) $2,080 per acre.
Total:									
Residence Lots	31.1	12	$161,219.62 $5,183 per acre.	32	31.1	13	$101,234.90 $3,373 per acre.	41	
Truck Farms	223.2	87	$143,664.66 $662 per acre.	47	223.2	87	$142,088.68 $653 per acre.	58	
Total	254.4	100	$305,884.00 $1,205 per acre.	100	254.4	100	$243,307.22 $964 per acre.	100	$344,066.00. $1,352 per acre.
Total, All Lands:									
Residence Lots	35.6	10	$192,084.62 $5,396 per acre.	40	35.6	10	$141,434.30 $3,972 per acre.	45	
Truck Farms	256	89	$194,515.09 $664 per acre.	60	256	89	$167,895.96 $649 per acre.	54	
Total	331.6	100	$386,599.71 $1,165 per acre.	100	331.6	100	$309,279.48 $932 per acre.	100	$514,344.17. $1,550 per acre.

[1] The witness cut this area into 22 lots valued at $1,800 per lot (R. 218).
[2] The witness valued this area at the average per acre of $671.60 (R. 317).
[3] See respondents' brief 11.

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OCTOBER TERM, 1943

UNITED STATES OF AMERICA, PETITIONER,

v.

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR and JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

We disagree with petitioner as to the questions presented.

The questions here are not questions of abstract law. They are whether there was a fair trial on the condemnation of land in Honolulu, Hawaii; whether the trial court committed prejudicial error. They are specific questions arising out of a jury trial. Almost all of the testimony complained of was brought out by Government counsel on cross-examination.

There are no such great and serious questions as "would have important consequences at the present time when the Government is engaged in condemning some 8,000,000 acres of land for natural defense and other purposes", as petitioner asserts. The question is whether justice was done according to law, between the parties in this case.[1]

In our view, the questions presented are (assuming questions not presented below but urged here by petitioner, are to be considered):

1. Whether the trial court committed prejudicial error in admitting or refusing to strike out, the testimony of experts as to the market value of the lands at the date of condemnation, because, after they had testified that the lands were presently adaptable and

---

1. Evidently trial counsel for the Government did not believe the jury had been misled or that the verdict was unfair. He thus addressed the jury after it returned its verdict:

> "Mr. Courtney: I desire to thank the jury for their patient consideration and for their courtesy. I have also to say that I am sorry that the verdict in this case was not more closely approaching the Government's appraisal. That, however, has no bearing whatsoever on what you have done, that was your verdict, and it is an American citizens' verdict,—that is all we want. We would like to be a little more right in our appraisals, but I want to state that it is the duty of the Government and it is the desire of the Government to give the full and fair measure of compensation. That is what the Government holds and that is what the Government will pay, so while it is disappointing that has nothing to do with the case, and I do thank you for your attention and I do appreciate your personal courtesy. I know your deliberations were sound and well considered." (R 442)

in demand for subdivision into residence lots and into truck farms, they gave as reasons for their opinion their estimate of the then rental value of the truck farming land (which rental value they testified would be considered by a willing buyer), and their estimate of its capitalized value, and on cross-examination by the Government gave their views as to the prices which certain portions would command if subdivided.

2. Whether the judgment of the trial court is to be set aside because it was brought out by the Government upon cross-examination of certain expert witnesses, that in arriving at their valuations they considered that the owner would not put its remaining lands on the market as subdivisions in the near future; where the Government introduced evidence to prove that large areas of similar land owned by others were available; where the court instructed the jury that it was not to assume that the owners would pursue any particular policy with respect to such remaining lands; and where the Government never raised the point in the trial court by objecting to testimony or by motions to strike on that ground, or otherwise.

3. Whether the trial court committed prejudicial error in permitting witnesses to testify to market value at the date of taking, without, on its own initiative, requiring that the question on value on direct examination, be framed as in the *Miller* case[1] (i.e. market value, excluding therefrom any value accruing from the authorization of the project); where the

1. *United States v. Miller*, 317 U.S. 369, 372.

Government did not object to the form of the question; where the land condemned was not in fact part of another project; where the Government contended and introduced evidence to prove that proximity of land to a military establishment was a detriment and not an advantage; where the Government asked the valuation questions of its own witnesses in exactly the same form as the owners did; where the Government, on cross-examination, did not ask any witness to measure the value, if any, accruing from the authorization of the project; and where the question was not raised in the trial court, or in the Court below until after it had filed its opinion.

STATEMENT

The Two Suits

On November 20, 1940, the United States, in behalf of the Public Works Agency, filed suit (No. 434) to condemn 77 acres belonging to respondents, to provide housing for persons engaged in national defense activities (R 10).

On November 27, 1940, the United States, on behalf of the Navy, filed a second suit (No. 436) to condemn 254 acres also belonging to the respondents, and adjoining the land condemned in the first suit, to provide housing for Navy personnel (R 40).

The defendants in both suits are the Trustees of the Damon Estate, and the lands being adjacent, the suits were consolidated for trial.

The 77 acres in the first suit (lots C1-C2) is rectangular. Its south boundary is Hickam Army Air Field; its west boundary is Pearl Harbor Navy Yard. Its north boundary fronts on Dillingham Boulevard, which runs directly to the main entrance of the Navy Yard (Ex. A, R 109; B, R 183; C, R 273).

The 254 acres in the second suit consists of two parcels. One, of 192 acres (lots C3A, C3B1 and C3B2) is rectangular and lies directly to the east of the 77 acre parcel. Its northern front is Dillingham Boulevard. The second, of 61 acres, called the Gore lot (lot D) is a triangular piece lying directly to the north of the 77 acre piece, separated from it by Dillingham Boulevard and the road to the Navy Yard. Its westerly side is the Navy Yard, and its hypothenuse fronts on Kamehameha Highway which runs into Dillingham Boulevard at the easterly point of the Gore lot (Exs. A, R 109; B, R 183; C, R 273).

The Lands

The lands are situate in Moanalua, in the City of Honolulu. Honolulu is situate on the Island of Oahu, Territory of Hawaii. The island is 46 miles in length and 25 miles in width. Honolulu lies along the southern shore of the Island and these lands lie to the west, approximately 6½ miles from the center of the City near Pearl Harbor (R 171, 202). Dillingham Boulevard, Kamehameha Highway and the Oahu Railway run directly west from Honolulu past this property.

Pearl Harbor is a natural harbor, also lying to the west of Honolulu. After the annexation of the Islands

in 1898, the United States in 1902 established a navy yard there and from time to time docks, machine shops and other installations have been built, and its harbor deepened and enlarged. The condemned lands lie immediately adjoining the main Navy Yard entrance, facing toward Honolulu.

Hickam Field is a large Army Air Field adjoining the Navy Yard and lying south of the 77 acre and 192 acre parcels. It was established in 1933. Also slightly to the east and south of the lands is Rogers Airport, the Territorial civilian airport for Honolulu.

These lands lie on the line of the Oahu Railroad, which proceeds from Honolulu through the Navy Yard and on to the west. Dillingham Boulevard lies on the south side of the railroad and Kamehameha Highway lies on its north side, leaving it at the east end of the Gore lot and continuing northwesterly along the hypothenuse of the Gore lot. Dillingham Boulevard and Kamehameha Highway are the principal roads leading to the west from Honolulu, and carry heavy traffic. Dillingham Boulevard is the principal road to Hickam Field, Pearl Harbor and Rogers Airport.

At the time the suits were filed, all of the lands except 2.25 acres leased to the Bishop National Bank, were under lease to the Honolulu Plantation Company and were under cultivation for sugar cane (R 116, 312). These lands, with other lands belonging to the Damon Estate, had been under lease for this purpose for many years, the current lease being for the 15-year term January 1, 1927-December 31, 1942, at a rental of $23.50 per acre net after taxes (R 312,

Ex. 1). Though the lease had an unexpired term of two years at the date of condemnation, it was stipulated that no account should be taken of this, but the verdict should be for the value of the full fee (R 103).[1]

The Trial

The trial commenced July 1, 1941.

After impaneling, the jury viewed the lands (R 112).

The Government opened with two expert witnesses (Crozier and Fernandez) who had collaborated and reached identical valuations (R 140) of $137,487. They testified the lands were then leased for growing cane at $23.50 per acre (R 131); that their highest, best and most profitable use was the growing of sugar cane (R 119-123, 135, 145, 150). They denoted a 200 to 250 foot strip on each plot fronting the highway as "the economic zone of influence" (121). This they gave a higher value than the remainder on the ground that it was potentially suitable, as to different portions, for residential (R 144-151) and business (R 121, 149) purposes. The Government then rested.

In opening for the owners, their counsel made clear that the chief issue was whether the land except the frontages was to be valued as mere cane land as contended by the Government, or whether it had higher and more valuable uses (155).

The owners then introduced the testimony of three experts (Castro, Harrison and Kearns) and of re-

1. It seems clear that all the witnesses improperly testified to the value of the land, subject to the lease. This of course was prejudicial to the owners.

spondent Russell, one of the Trustees, as owner. Each testified the lands had outgrown the category of cane lands and their highest, best and most profitable uses were, as to portions, for residences and business, and as to the remainder, truck farming (R 158-171, 204-209, 239-243, 318-321, 326); that the only reason the lands were then being used to grow cane was because of the unexpired lease to Honolulu Plantation Company (R 166). Each further testified the highest and most profitable use of the portions of the property fronting on the highways (aggregating approximately 40 acres in all, according to the experts) was for residence or business purposes, thus agreeing in substance with the Government's witnesses (R 121, 144, 151).[1] They disagreed with the Government's witnesses as to the best use of the rear portions, however, testifying that in their opinion such portions, aggregating 292 acres, were adaptable to and most valuable for truck farming, for raising vegetables, market flowers, chickens and fruit, such as papaya.

Castro, for the owners, testified the lands had outgrown the category of cane lands because of the growth of Honolulu[1] and for two years past buyers of small homes were going as far as twelve miles from the center of the city and would prefer these lands, only 6½ miles from the city's center (R 167, 171).

---

1. Petitioner's brief gives the impression that almost all the land was claimed to be adaptable to residence and business subdivisions. The experts for the owners only classed 40 acres, less than 13%, as such. The remainder of 292 acres they classified as truck farm land.

On cross-examination he testified his estimates were on the basis of the normal expansion of the city and not on the abnormal or emergency conditions existing in 1940 (R 181).

Castro testified that he had taken into consideration all the factors a willing buyer would consider (R 163, 168, 170); that at his valuations, a willing buyer would have made a good investment (R 163) whether he should subdivide and sell or hold and lease (R 198). He did not undertake to say how the buyer would handle any subdivision or how much profit he might make (R 198).

Castro gave his opinion as to the market value of each tract which he found in the aggregate to be $386,599.68 (R 160, 167, 169). He stated on direct examination that he arrived at his opinion by considering the average rental value commanded in this area and by capitalizing it on the basis of the value of money today which he said was 4% (R 161, 163, 167, 169). The court overruled the Government's objection, saying "This is the witness' explanation of his reasoning, his deduction and conclusion by working it out as to its rental value." (R 161). It is clear that the rental value testified to was of the land in its then condition at the date of taking (R 161).

---

1. The Federal census shows the population of the City of Honolulu and the Island of Oahu as follows:

	Honolulu	Oahu
1910	52,183	81,993
1920	83,327	123,496
1930	137,582	202,887
1940	179,359	257,698

On cross-examination the witness said he used the capitalization of rental method to ascertain the value of the fee at the time of condemnation (R 179, 180); that of the area comprising the Gore lot, 16 acres would be adapted to residence lots (R 188); that of the area included in Case No. 434, the frontage with a depth of 150 feet he valued at $30,685 (R 190), and the balance of the tract at $48,850 (R 191); that a similar frontage in the 192 acre tract in Case No. 436, he valued at $110,042 (R 191); that his values did not necessarily assume a subdivision of the three tracts (R 199); that the value placed by him on the Gore lot assumed a road would be constructed at small expense (R 199), and in valuing that tract he assumed a part of it would be subdivided into lots (R 200), and on redirect he stated that in his opinion a buyer would have had that in mind (R 200).

Harrison, the second expert for the owners, testified the lands had outgrown their category as mere cane lands because of "the rapid increase in population, the demand for outside areas and the tremendous traffic going to and from the country down that way" (R 205), and their highest use was for residential and small farm areas (R 205). He said there had been a continuing demand for such areas for the past four or five years, and there had been a number of inquiries for lots out that way (R 205). He testified to his opinion of the market value of each tract, finding the aggregate to be $309,279 (R 205-209, 461). On direct, Harrison testified as to value only on the basis

of the highest, best and most profitable uses, and that he had taken into consideration all the factors a willing buyer would have in mind (R 206, 209). He was neither asked nor did he state on direct that he arrived at his values by estimating and capitalizing rental values or estimating profits from sales (R 203-210).

On cross-examination Harrison testified that in arriving at his opinion of the value of the Gore lot (Lot D) he had, as to the 16 acres fronting the road, assumed a subdivision of 77 lots which would sell for 12½¢ a square foot or an aggregate of $88,223 (R 211, 216). (The market value placed by the witness on the *entire* tract of 61 acres was $63,449 (R 206).)[1] He also based the value on an estimate of the rental obtained if the lands were leased to a person who had in turn leased the area for residence purposes and a capitalization of that rental at 4% (R 216). The remaining portion of 41 acres, he assumed would be leased for small farms (10 acre tracts) and he placed rental values on them of $30, $35 and $40 per acre, which he capitalized at 5% (R 213). The other lands were treated in a similar way (R 216-218). The rentals used as a basis for determining values were in every instance net rentals, i.e. rentals that would be

1. It is evident that Government counsel and the witness misunderstood each other—Government counsel thinking $88,223.12 was the resale price of the entire Gore lot, when the witness had merely testified that this was the assumed resale price of only the 16 acres of residential property which he valued at $35,311 (R 212-3). This error seems to be perpetuated in petitioner's brief here. The misunderstanding was cleared up on redirect (R 222).

received by the willing buyer net, who bought the land from the owner and in turn leased them.

On redirect Harrison stated the buyer might have a different subdivision in mind (R 220), and explained his reference to the figure $88,223 on cross-examination (R 211) was what the buyer could have sold 77 residence lots of the Gore lot for, after he had subdivided it (R 222). A motion to strike out all of the witness' testimony was denied (R 228).

Kearns, the third expert for the owners, testified the highest use was as a "suburban residential area" (R 239) and small farms, because of the great road or highway through the property, the rapid expansion of Honolulu in the last ten years, and the large civilian population employed in Pearl Harbor and Hickam Field (R 239). He gave his opinion as to market values as of November 1940 over objection by Government counsel (R 240, 243, 246), testifying that a portion of each tract was best adapted for subdivision into residence lots (approximately 40 acres in all) and the rest (292 acres) to truck farming, which farming areas he considered had an annual net rental value of $30 to $40 (R 245); that there was a demand for truck farming areas, and these could be readily sold or leased (R 243). The witness also said the buyer could possibly have in mind some other method of subdivision (R 242), and if the buyer bought the land, subdivided it, and put it on the market he would have made a profit (R 241, 247), but he did not testify on direct as to what that profit would be.

The first question asked Kearns on cross-examination was "How much profit, Mr. Kearns" [i.e. how much profit would the buyer make] (R 247). In response he testified the buyer could have made a profit ranging from 16% to 22% (R 247-8). He further testified on cross-examination that the buyer could have disposed of the Gore lot in 18 months and the other tracts in two or three years (R 248-9). The witness testified to the possibility of subdivision and the values of lots after subdivision, giving figures similar to those given by Harrison (R 260) and that his values of the truck farming areas were based on the capitalization of the rental value at 5% (R 262).

Kearns did not testify on direct with respect to capitalization or the earning power of money. The Government on cross-examination, however, questioned him on this subject, and did so before he had testified on cross-examination that in arriving at his value he had capitalized rentals (R 249-253).

The owners' final witness on value was respondent Russell, who testified as owner and not as an expert, as was made clear to the jury (R 311, 313). He had his opinions as to the value of each of the three tracts in November 1940 (R 313, 314, 321, 325, 330). He based his opinion on the fact that the values stated by him represented the capitalization of the estimated net income from rent (R 321) at 4%, which he considered the proper rate to use because he knew large sums of money in the town were looking for 4% investments and could not get them, and any purchaser of the land who used it so as to obtain a net of 4%

interest would have a wonderful investment (R 319). The rental value was based on a plan the Damon estate had worked out several years before and more recently as to the Gore lot (R 314-17, 335) and on their experience with subdivisions in the vicinity (R 316, 332, 339). His values were what he considered a willing buyer would pay (R 327).

On cross-examination Russell said that in late 1939 or early 1940, the Navy became interested in the development of the Gore lot by the Damon Estate to relieve the housing shortage at Pearl Harbor (R 337); that the trustees recognized that they were no longer dealing with cane land and had in mind the gradual development of the land (R 341-343); that they had a subdivision plan of the plot and put a rental value on each lot (R 344); that there were 265 lots which could be disposed of in 12 or 14 months after April, 1941, when the tract would become available, and that they thought the market would rapidly accelerate (R 345); that the market values of these tracts in November, 1940, as previously stated, would be on what the buyer could have earned 4% net (R 351); that 1265 lots on the makai (lower) side of the road could be marketed in five years, during which time they would be increasing in value, but the estimated rents were not so increased (R 353, 354).

Much evidence was introduced showing that in November, 1940, there was an existing and increasing demand for lots at Moanalua for homesites, business purposes, and truck farming, for which purposes the land would yield higher rentals than for cane cultiva-

tion; that such use of the land was not speculative or remote; and had not already taken place because of the unexpired cane lease.

It was testified that there had been four previous subdivisions of lands of the Damon Estate at Moanalua—in 1924, 1929, 1933 and 1938, the lands being leased by the subdivider in each case and not sold (R 282-285). The first, in 1924, consisted of 9.53 acres and was subdivided into 14 lots (R 356) which rented for $133.20 per acre per year net (R 332), and were used as farm lands (R 292); the lots having been disposed of in six months (R 356).

The 1929 subdivision consisted of 121 acres (R 284) subdivided for farm lands and home sites (R 292) at a net annual rental of $42.26 per acre (R 332) and was 90% occupied in two to three years (R 357).

The 1933 subdivision which was located north of John Rodgers Airport (R 284) consisted of 178 acres (R 284) was subdivided into more than 300 lots (R 357) and the lands were rented to a few small farmers who raise chickens and "the rest are home owners who are employed either downtown in business or at the Navy Yard or Hickam Field" (R 293). The net annual rental was $63.88 per acre (R 332). The lands were 90% occupied in a little over three years (R 357).

The fourth subdivision made in 1938, and which was in the immediate vicinity of the condemned lands (R 274 and Gov't Ex. C) was made by Mr. Albert Waterhouse, who leased 11½ acres from the Damon Estate for 25 years (R 271). The rental to the Damon Estate was $80 per acre per year net, the lessee paying

all taxes (R 276). Waterhouse was prevented from using 2½ acres of this area until the cane lease expired in 1942. He subdivided the remaining nine acres into 82 lots (R 272) for cottages which he leased to navy men (R 276). Waterhouse had attempted to acquire additional lands for the same purpose but could not (R 277-280). He testified there was a demand for property of this kind in that vicinity as far back as 1937-1938 (R 280). The evidence of the number of lots and the speed of disposition was introduced by the Government (R 356).

Mr. Sam R. Damon testified all of the lots in the subdivisions of the Damon Estate in 1924, 1929, 1933 and 1938 were fully occupied by tenants prior to November, 1940; that there was a further demand for homesites caused by the building of Hickam Field in 1933, and the gradual enlargement of the Navy, and the increase in the population of Honolulu (R 285, 286, 297); that prior to November, 1940, there was demand for small truck farming areas in Moanalua (R 287); that in partial response to those demands the Trustees contemplated a subdivision of the Gore lot into business sites and home sites (R 287, 288, 335). In July, 1940, with this idea in mind they arranged with Honolulu Plantation Company to surrender the lease on the Gore lot in April, 1941 (R 288); that there was a demand for business property at this time (R 290).

Also it was shown that in 1937 the Trustees sold 3 acres in the immediate vicinity, to Honolulu for a school for $5,250.00, or $1750 per acre (R 301, Ex.

1); and that on September 12, 1940, the Trustees leased to the Bishop Bank 2.25 acres of the 77 acre parcel for thirty-five years, at a rental of $225 per year net ($100 per acre per year) (R 321, Ex. 3).

The Government introduced rebuttal testimony to show the population trend had been to the east rather than to the west of Honolulu and the sale of lots in subdivisions to the west had been slow (R 364); testimony as to the Kamehameha Heights subdivision in 1924-26, the sale prices, the spread between cost and selling prices, etc. (R 370), also as to the Mendonca subdivision (R 372), the number of houses built in Honolulu each year from 1937 to 1940 (R 373); that the purchaser of land in the vicinity of Pearl Harbor could not pay more than 20% of the amount he could sell it for after subdivision and make a profit (R 374); the procedure on subdivision, the size of lots, the percentage in road area and other costs; and that the profit estimate elicited from the owners' witnesses by the Government was less than the necessary margin (R 377).

The Government also introduced testimony that 6% is a reasonable and fair rate of capitalization for land of this kind, and an investor would not be justified in depending on a 4% rate (R 378-9); also testimony that if other lands in the vicinity were subdivided, it would affect downward the market value of the condemned lands (R 381).

Government counsel also offered to prove that land in Wiahawa, a town of 5000 near the entrance to Scofield Barracks (with a population of fifty thou-

sand) was adversely affected in value because placed out of bounds from time to time by the military. This was to rebut testimony that the demand for these properties rested "in some degree" on the personnel of the Army and Navy reservations. This offer was refused (R 397).

A motion by Government counsel to reopen his case, was granted, and testimony and a map (Ex. G) were introduced to show extensive areas, besides the Damon lands, lying in the vicinity of Pearl Harbor, were equally available for subdivision (399-402).

At the close of the testimony the Government moved to strike all the testimony of the witnesses Russell, Castro, Harrison and Kearns on the ground that their evidence was incompetent and not proof of market value since based upon capitalization of income from an alleged subdivision, and, moreover, on speculation and conjecture (R 418-419). The motion was overruled (R 419). A motion for a directed verdict was also overruled (R 419).

The Court then instructed the jury (R 422). The instructions, as the Court below observed, followed closely the law stated in *Olson v. United States,* 292 U.S. 246 (R 461).

After argument by counsel, the jury retired and subsequently rendered verdicts of $61,830.40 in No. 434 and $203,574.40 in No. 436 (R 440-1).

Summary of Valuations and Verdicts

In summary, the valuations given by the various witnesses and the verdicts, are:

Source	Case No. 434 Lots C-1 and C-2 (77 acres)	Case No. 436 Lot D (Gore lot) (82 acres)	Case No. 436 (192 acres)	Total
Government witnesses	$ 33,498.00	$ 25,263.00	$ 78,706.00	$137,487.00
Harrison & Kearns	63,772.35	63,449.43	182,058.00	309,279.78
Castro	79,715.43	79,311.75	227,572.50	386,599.68
Russell	170,279.17	127,931.25	216,134.75	514,345.17
Verdicts	61,830.40	$203,574.40		265,404.80

The awards mathematically are at the rate of $800 per acre for the land in each case.

Proceedings in Circuit Court of Appeals

Thereafter the Government appealed to the Circuit Court of Appeals for the Ninth Circuit (R 36, 76), which, on January 6, 1943, affirmed the judgments (R 457, 132 F.2d 699), and, on March 2, 1943, denied a petition for rehearing (R 464).

SUMMARY OF ARGUMENT

Petitioner specifies as errors by the Court below certain alleged holdings by it (Pet. br. p. 8).

First. Petitioner asserts that the Court below held that the value of agricultural land claimed to be adaptable for subdivision may be determined by capitalizing the estimated income which might be produced if the lands were subdivided and leased for dwellings, business places and truck gardens.

We contend that the Court below made no such holding (R 457).

Petitioner's claim that the owner's witnesses based their valuations on sales prices or rentals after subdivision is unfounded, as the Court below points out (R 462).

The owner's evidence consisted of estimates of the market value of the lands at the time of condemnation, having in mind their then adaptability to and existing demand for use for residence, business purposes, and for truck farms. The evidence is clearly admissible in accordance with accepted legal principles. No reversible error was committed by the trial court, and the Court below committed no error in affirming the judgment.

Second. Petitioner asserts that the Court below committed error in holding that value arising from a landowner's monopoly of undeveloped lands may be included in the just compensation awarded upon condemnation of a part of that land.

We contend that the Court below made no such holding (R 457).

The fact that some, not all, of the owner's witnesses on cross examination stated, that in arriving at their valuations, they considered the owner would not put its remaining lands on the market as subdivisions in the near future, was not error because: (1) the matter reflects on the weight of such testimony and not on its admissibility; (2) the Court properly instructed the jury that it was not to assume that the owner

would pursue any particular policy with respect to such remaining lands; (3) the Government introduced evidence to prove that large areas of similar land owned by others was available, and (4) the Government never raised the point in the trial court by objecting to testimony or by motions to strike on that ground or otherwise.

Third. Petitioner asserts that the Court below erred in holding that enhancement of value due to the project for which the lands are taken, may be included in the compensation paid for such lands.

We assert that the Court below made no such holding (R 457).

We contend that (1) the Government advanced no such contention in the trial court; (2) there is no factual basis in the record for the Government's contention that the lands taken were part of another project; (3) the Government made no objection to the form of the valuation questions and asked the valuation questions of its own witnesses in exactly the same form as the owner did; and (4) the Government contended and introduced evidence to prove that proximity of the land to a military establishment was a detriment and not an advantage.

ARGUMENT

Petitioner has specified as errors, certain alleged holdings of the Court below —phrased as questions which petitioner asserts are presented here (Pet. Br. p. 8). As already pointed out, we do not agree. More-

over, we do not agree that the Court below took the action or made the holdings which petitioner asserts to be erroneous.

We will consider petitioner's specifications of error in order:

SPECIFIED ERROR 1.

Petitioner asserts the Circuit Court of Appeals erred—

> "1. In holding that the value of agricultural land claimed to be adaptable for subdivision purposes may be determined by capitalizing the estimated income that might be produced, if the lands were subdivided and leased for dwellings, business places and truck gardens." (Pet. Brief p. 8)

We submit the Court below made no such holding, as an examination of its opinion will show (R 457).

Petitioner asserts here (Pet. Br. p. 8) (and a similar assertion was made in the Court below) that—

> "All of the respondents' witnesses based their valuations upon the estimated sales prices or the capitalization of estimated rentals which they thought could be obtained from residence, business or truck farm lots after subdivision of the sugar cane lands. Such evidence was wholly incompetent and should have been excluded * * *."

The Circuit Court of Appeals, in passing on this contention said (R 462):

> "After careful scrutiny of the record, we believe the testimony for appellees [owners] was different than the description of it made by

appellant [Government]. Appellees' valuation witnesses testified as to the market value of the land in November 1940 * * *."

"Appellant's argument is based on the assumption that appellees' witnesses were testifying as to what prices the land would sell for if subdivided, and as to rents which could be derived from the land if it were improved. The effect of that argument is that such witnesses were testifying not as to present value but as to some future value. The record gives no support to that argument, but, in fact, shows that the witnesses were testifying as to the value of the land in November 1940."

Furthermore, the Court below having first determined that the owners' witnesses testified to the market value of the land in November, 1940, and not to its future value as subdivided, as the Government contended, then correctly applied the law. It did not, as petitioner suggests, hold that value could be determined by capitalizing the estimated income if the land were subdivided and leased. What the Court below did, was to apply the rule of *Olson v. United States,* 292 U.S. 246, and on its authority, and other cases cited, hold that the trial court had not committed error (R 461-4).

It will thus be seen that the question posed by petitioner is not in the case, and the Court below made no such error as is specified here by petitioner.

The Owners Did Not Contend for Subdivided or Business Values: Their Claim Was Only for the Then Market Value Having in Mind the Then Demand for the Property for Subdivision.

The owners at no time contended that the value of the land was to be determined by estimated sales prices, or capitalized estimated rentals, to be obtained after subdivision, nor did they introduce evidence to that effect.

What the owners contended, and what they introduced evidence to show, was:

1. That the lands which had been cultivated in sugar cane for years, and which at condemnation were subject to a 15-year lease to a sugar plantation with two years of the term unexpired, had outgrown their category of cane land and by reason of the steady growth of Honolulu, the increase in the population, and the development of the adjoining Navy Yard and Hickam Field, with their increasing number of civilian employees, were presently adaptable to and in present demand for a higher and more valuable use than the growing of sugar cane, to wit, for residence and business use, as to approximately 40 acres adjacent to the highways, and as to the remaining 292 acres, for truck farms, all of which would have been taken into consideration by the buyer and seller in any negotiation for the property.

2. That the foregoing should be given consideration in determining the market value of the lands on the date of condemnation, and that estimates by qualified witnesses could properly take these facts into consideration.

The Government witnesses having testified to the rental under the existing sugar lease (R 131), having given the tons of cane and sugar produced per acre, and having tenaciously contended that the highest and most profitable use of the lands was for growing sugar cane (119, 123), the owners naturally met those contentions by showing that the lands were presently adaptable for residence purposes and small farms, that lands in the vicinity had been leased or sold for these purposes, that there was a present existing and growing demand for this property for such purposes, and having these things in mind, a willing purchaser would have paid as of the date of condemnation, the various amounts stated by the witnesses.

None of the owners' witnesses was asked or testified on direct examination as to the rental value or sales prices after subdivision, or as to the capitalization of rental values after subdivision, nor were their opinions as to market values based on the capitalization of the net income which could be derived if and when the lands were subdivided and leased. Their opinions were as to the market values of the tracts as they stood in November, 1940, in view of their suitability for, and adaptability to, the better and more profitable use for sale or lease for business and homes and small farms, which opinions were based on what the witnesses believed were the then rental values of the land. The existing lease which yielded $23.50 net per acre annual rental as cane land, would shortly expire, and the witnesses believed that the rental value of the lands was greater than the rental reserved in the lease,

having in view the potential use. In other words, it was the market values of the tracts and not the value of the subdivided lots to which the witnesses testified.

The Trial Court Committed No Error in Its Rulings.

The evidence offered by the owners was admissible and the trial court did not err in ruling on the Government's objections or its motions.

As hereafter pointed out, the court's rulings would not constitute prejudicial error, even if the owners' evidence was not properly admissible, but the evidence offered was clearly proper, as found by the Court below.

The owners' evidence was principally directed to two points—

1. The highest and best use for the land; and

2. Its market value having those uses in mind.

1. The owners' evidence of the highest and best use showed that although presently planted to cane it was then suitable and in actual demand for residence, business and farm use.

As pointed out in *Olson v. United States,* 292 U.S. 246, 255 "The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future, is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use, affects the market value while the property is privately held."

Here the land was under cultivation for cane, under a long lease with two years unexpired. Did the evidence show that its highest and most profitable use was, as claimed by the owners, for residence and business purposes as to approximately 40 acres adjoining the highways, and for small truck farms as to the balance of 292 acres? The evidence upon this issue was in part as follows:

The Government witnesses testified that the land fronting the highways to a depth of 200 to 250 feet had a higher value for other uses than for cane land (R 118, 121, 123, 126, 151).

The owners' witnesses testified there was an existing and growing demand for the land for residence, business and truck farms; only the unexpired cane lease had prevented earlier development (R 243, 249, 265, 287).

On September 12, 1940, 2.2 acres of the lands had been leased to the Bishop Bank for 30 years at an annual rate of $100 per acre per annum net (R 323, Ex. 3).

On December 17, 1937, the owners had sold 3 acres of adjoining property to the City of Honolulu for a school at $1750 per acre (R 303, Ex. 1).

There were two banks and a park in the immediate vicinity (R 118, 139).

The lands fronted on main highways on which there was heavy and increasing traffic.

The lands adjoined Hickam Field and Pearl Harbor Navy Yard.

Nearby properties of the owners had been leased for subdivision or had been subdivided and leased for residence and truck farms as follows: 1924—9.5 acres; 1929—121.5 acres; 1933—178.7 acres; 1938—11.5 acres (283-5).

The owners had been approached by the Navy in 1939 or early 1940 with the view to the owners erecting housing on these lands to relieve the shortage at Pearl Harbor (337).

The owners had planned a subdivision of the property and as early as July 1940 had arranged with Honolulu Plantation Company for a surrender of its lease on the Gore lot as of April 1941, to permit such subdivision (R 288).

The allegations in the petitions are that the lands are necessary as sites for housing for persons engaged in national defense activities or for navy personnel (R 10, 11, 41).

The evidence here admitted was more direct and persuasive of potential use and present value than was that which this Court in *McCandless v. United States,* 298 U.S. 342, held it was error to exclude. There the owner of cattle lands in Hawaii introduced evidence that the land was (p. 343) "suitable for growing cane and would produce an average of 70 to 75 tons of sugar cane to the acre, from which could be extracted 8 or 9 tons of sugar" and offered evidence to prove that it was adaptable to the purposes

of a sugar plantation, by bringing water from a distance of 8 to 10½ miles; that the cost of recovering and transporting such water would render the use of it economically feasible and profitable; that these matters would be taken into consideration by a prospective purchaser of the land. This Court held that the exclusion of this evidence was prejudicial error.

It should be noted that the Government there contended that the offer of proof was insufficient because it did not "exhibit an intention to show how much the value of the land would be increased or the probable cost of the irrigation improvement"—quite the opposite of its position here.

There can be no question but that the evidence showed clearly that the lands were in present demand for business and residence purposes as to about 40 acres fronting on the highways, and for truck farming as to the remaining 292.

2. The owners' evidence as to market value was admissible.

The evidence as to value introduced by the owners is shown in our statement of facts. It is submitted that it was proper and admissible. It consisted of estimates by qualified witnesses of the market value of the land at date of condemnation having in mind the highest and most profitable use. It did not consist of estimates of value after subdivision, but of value of the land as of the date of taking in its then condition.

Petitioner devotes many pages to a discussion of the proposition that market value of agricultural land may not be arrived at by capitalizing the net income which in the opinions of witnesses could be obtained if the lands were subdivided and leased for dwellings, business places and truck gardens (Pet. Br. p. 12-19), and, as subsidiary to that proposition, that agricultural land may not be valued by capitalizing the estimated net income which might be earned after subdivision into lots (Pet. Br. p. 20-30), and cites many cases.

We do not find it necessary to contest the validity of either of these propositions, for they do not apply here. The owner did not introduce evidence of the value of the land or its net income after subdivision, nor evidence of the capitalization of its net income after subdivision into lots. The owner's witnesses valued the land at the date of taking in its then condition, having in mind its then adaptability to, and its present demand for, residence, business and farming uses, and based their views in part on the capitalization of net rentals obtainable at time of taking by a willing buyer, in purchasing with those uses in mind.

The many cases cited are not in point. As we will illustrate later, the facts in every one, upon examination, will be found to involve the value of the land after subdivision, or the earnings of improvements or of a business, or a failure to prove that demand for subdivision was reasonably to be expected, or some other condition not present here.

It is not clear that petitioner contends that estimates of rental value of the lands at the date of taking in their then condition, but for a different use, are improper. If such is petitioner's contention, it is submitted that it is erroneous and that estimates of such rental value are admissible in a case such as this, as the Court below held.

All the experts, both Government and owners, agreed that the highway frontages were adaptable to residence and business use. They differed as to value. As to the portions back of the frontage strips, the Government's witnesses took the view that they were best suited to the cultivation of cane. The owners' witnesses considered those areas as suitable for small farms and truck gardening, which would indicate a higher rental value, and in forming their opinions of value they took that rental value into consideration in connection with the known demand for such areas for such purpose.

If the land is adaptable for some better and more profitable use than that for which it was theretofore used, the landowner is entitled to the benefit of that. It obviously follows that the value of the land for another use may be shown to be more profitable. That necessarily involves evidence of the value for that use. How is that value to be ascertained? Various elements, including demand for use, enter into the matter of value. *Monongahela Nav. Co. v. United States,* 148 U.S. 312, 328.

The question must be reasoned out upon a practical basis, having in mind the factors which a willing

buyer would take into consideration when negotiating for the purchase of the land, *Boom Co. v. Patterson*, 98 U.S. 403, 407.

In buying for an investment a prospective buyer would naturally consider whether for another use, a better rent could be obtained than had previously been paid. In other words, was the land worth more for purposes other than the cultivation of cane, and if so, how much more? The landowner is entitled to lay before the jury through competent witnesses what in their opinion the willing buyer would have in mind, and what he would pay for the land.

It was natural that the witnesses should have considered rental value in forming their opinions of market value.

There was evidence of but one sale of land at Moanalua. That was of the school lot in 1937. These lands had been under lease for many years for cane cultivation at $23.50 per acre per annum net. A lot adjoining Hickam Field had recently been leased to the Bishop Bank. Several nearby pieces had been leased in small lots. The class of people who would take up land for small farming habitually hold under leases. Rental value was properly considered as an important factor in determining the market value of the land.

To say that evidence of the estimated rental value of the land, in view of its better and more profitable use, cannot be shown, would be equivalent to saying that the owner cannot have the benefit of the value which the potential use of the land would justify.

Rental value is admissible as evidence of the market value of land. 29 C.J.S. p. 1266; *United States v. Shingle,* 91 F.2d 85, 86, cert. den. 302 U.S. 746; *Assessors of Quincy v. Boston Con. Gas Co.,* 309 Mass. 60, 34 N.E.(2) 623, 626; *Re Taxes Bishop Estate,* 27 Haw. 190, 196.

Rental value being an important consideration in determining market value of land, it logically follows that in a case where, as here, the evidence shows that the land has a present value and is in demand for a better and more profitable use, it is admissible. The landowner may therefore show, not only what rental the land is presently yielding, but what it is capable of producing. Orgel on Valuation Under Eminent Domain, p. 570; *Chicago, Burlington & Quincy Ry. v. North Kansas City Co.,* 134 F.2d 142 (C.C.A. 8), cert. denied 319 U.S. 771; *Northern Pac. R. Co. v. North American Tel. Co.,* 230 Fed. 347, 352 (C.C.A. 8), cert. den. 249 U.S. 607; *Lebanon & Nashville Turnpike Co. v. Creveling,* 159 Tenn. 147, 17 S.W.(2) 22, 26; *Idaho Farm Dev. Co. v. Brackett,* 36 Idaho 748, 213 Pac. 696, 699; *Somers v. Meriden,* 119 Conn. 5, 174 Atl. 184, 186; *Sanitary District of Chicago v. Pittsburgh F. W. & C. R. Co.,* 216 Ill. 575, 75 N.E. 248, 252; *State v. Suffield & Thompsonville Bridge Co.,* 82 Conn. 460, 74 Atl. 775, 778; *Gearhart v. Clear Spring Water Co.,* 202 Pa. 292, 51 Atl. 891, 892; *Egan v. Philadelphia,* 108 Pa. Sup. 271, 164 Atl. 813, 815; *In re Taxes Carniot Estate,* 13 Haw. 688, 689.

The cases cited in this connection in petitioner's brief (pp. 13-14) are not inconsistent with the foregoing. They can be readily differentiated.

In *Pennsylvania S. V. R. Co. v. Cleary,* 125 Pa. 442, 451, 17 Atl. 468, the jury was instructed to consider how the lands could best be subdivided, how fast the lots could be sold, and at what price. No such question was asked by the owners or submitted to the jury here.

In *Hall v. Delaware L. & W. Ry. Co.,* 262 Pa. 292, 105 Atl. 98, the landowner sought to show that a tract was available for "elaborate and palatial home sites" and hence worth more than mere agricultural land. No showing was made of any present demand for such sites; the market and demand were "limited and precarious."

In *Laureldale Cemetery Co. v. Reading Co.,* 303 Pa. 315, 154 Atl. 372, a cemetery company which had acquired vacant land five miles from Reading, Pennsylvania, for $500 per acre, sought to prove in a condemnation case four years later a value of $26,000 per acre by evidence of anticipated profits from the sale of sepulture rights 30 years in the future. The court, observing that this "looked like real estate alchemy" excluded the evidence.

In *Chatfield v. Board of Revision of Taxes,* 346 Pa. 159, 29 A.2d 685, it was sought to prove that the present value of an unsubdivided area was equal to the gross selling prices after subdivision and the building of homes, less expenses. As noted above, that is precisely what the owner's witnesses did not do here.

City of Los Angeles v. Hughes, 202 Cal. 731, 262 Pac. 737, *Louisville & N. R. Co. v. Montluzin Co.,* 166

La. 211, 116 So. 854, and *Kansas City & Topeka Ry. Co. v. Splitlog,* 45 Kan. 68, 72, 25 Pac. 202, were cases where the owner was contending that the value of the lots after subdivision was the measure of his compensation. In the case at bar the values were those before subdivision.

In *Monongahela West Penn. Pub. Serv. Co. v. Monongahela Devel. Co.,* 101 W.Va. 165, 132 S.E. 380, value for subdivision purposes was rejected because no showing had been made of any demand for that purpose. Here the existing demand was clearly proved.

In *Wadsworth Land Co. v. Piedmont Traction Co.,* 162 N.C. 503, 78 S.E. 299, it was sought to show that bottom lands subject to overflow could be made into a park which could be beautified by laying of walks, building summer houses and otherwise and that such improvements would enhance the value of the remaining lands for residence purposes. This was properly rejected as too speculative.

The remaining cases, *Pullman Co. v. Chicago,* 224 Ill. 248, 79 N.E. 572; *Burt v. Wigglesworth,* 117 Mass. 302, 306; *Greenfield v. City of Philadelphia,* 282 Pa. 344, 354, 127 Atl. 768; *Matter of City of New York* (Blackwells Island Bridge), 118 App. Div. 272, 274-275, 103 N.Y. Supp. 441; *Tallman v. Met. El. R. Co.,* 121 N.Y. 119, 23 N.E. 1134, all involve situations where the owner sought to show what the lands would be worth after erecting buildings thereon and contended that these sums, less the expenses of building were the measure of his compensation. And in *Burt v. Wiggles-*

worth, supra, the court indicated that while such evidence was too prospective and indefinite in nature to be competent evidence of the present value of the land not built upon, it might be stated by an expert as one of the reasons upon which his opinion as to the present value of the land is founded. (117 Mass. at 306, citing as authority *Dickenson v. Fitchburg,* 13 Gray (Mass.) 546.)

In *Pullman Co. v. City of Chicago,* supra, the court did not even hold that such evidence was inadmissible, but only that the jury was justified in not fixing the present value of the land at a figure approaching the estimated value after the building was erected; in short, that the objection went to the weight rather than the admissibility of the evidence.

Nor are the cases cited by petitioner on pages 20 and 21 of its brief apposite here. In each of these cases, as petitioner itself states, the owner sought to introduce as evidence of the market value of land, evidence of the profits which would be realized from a business conducted or a building erected on the land. Obviously such evidence does not indicate the present value of the land. Here the owner introduced no such evidence and made no such contention.

Petitioner's attempted distinction of *North American Telegraph Co. v. Northern Pac. Ry. Co.,* 254 Fed. 417 (C.C.A. 8) supra, and *United States v. Shingle,* 91 F.2d 85 (C.C.A. 9), supra, viz. that they stand only for "the proposition that the capitalization of rentals accruing from existing leases is some evidence of

value" (Pet. Br. p. 26) is not sound. In the North American Telegraph case the railroad successfully established its contention that a higher rental value than that accruing from the existing lease should be the basis of capitalization. And in the *Shingle* case, the owner successfully established his contention that his rights of fishery had a higher rental value, viz. $3600 per year, than that stipulated in the existing lease thereof, which was $3,000 per year (see Record in *Shingle* case, pp. 73-75), and that $3600 rather than $3,000 should be the basis of capitalization in order to determine the value of the rights.

Petitioner (Br. pp. 26-27) cites *McCandless v. United States,* 74 F.2d 596 (C.C.A. 9th). There the court dealt with the admissibility of evidence of rental under certain leases of Government lands in the vicinity, which had been let at auction and contained special provisions, but it made no reference to the rental value of the land taken. It is not authority on the point to which the case is cited in the brief. It did not hold that the rental value of the condemned land was inadmissible.

The profits to be derived from a business are a vastly different thing from the rent to be derived from land, since such profits would depend on the amount of capital invested, business conditions, the business capacity of the proprietor, and other possible considerations, none of which would have any relation to the value of the land upon which the business was being conducted. Care must be taken to distinguish the one from the other. 2 *Nichols on Eminent Domain*

(2nd ed.) p. 1172; *Assessors of Quincy v. Boston Con. Gas Co.*, 309 Mass. 860, 34 N.E.(2) 623, 626; *Denver v. Quick*, 108 Col. 111, 113 P.(2) 999.

The distinction was pointed out in *Gearhart v. Clear Spring Water Co.*, 202 Pa. 292, 51 Atl. 891, where the court said (p. 892): "The probable returns from an investment in land because of the use which may be made of it is a consideration which enters into an intelligent estimate of its value, and is entirely distinct from an estimate based on the profits of a business which may be conducted on it." See, also, *National Brick Co. v. United States*, 131 F.2d 30 (App.D.C.).

In *Orgel on Valuation Under Eminent Domain*, p. 568, it is stated that "Although courts and text-book writers have often stated that, as a general rule, income in the nature of profits from a business is not admissible evidence of the value of the premises on which the business is located, they have also stated that, as a general rule, income in the nature of rents is admissible."

In *Cleveland, etc. R. Co. v. Backus*, 154 U.S. 439, 445, the court said "But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated."

It being clear, then, that evidence of rental value of portions of these tracts for small farming was properly admitted, it follows that it was proper to capitalize it in order to ascertain the market value of the

land. When rental value is considered as a basis for ascertaining the value of land, it must be capitalized at some rate. What rate of capitalization should be used is a question of fact for the jury to decide. *Orgel on Valuation Under Eminent Domain*, p. 575; *Bonbright on Valuation of Property* (Vol. I), p. 415; *Schmutz, Appraiser's Handbook*, p. 149; *North American Tel. Co. v. Northern Pacific R. Co.*, 254 Fed. 417, 418; *Chicago & N. W. R. Co. v. Chicago Mechanics Institute*, 239 Ill. 197, 87 N.E. 933, 943; *Lomas & Nettleton Co. v. Waterbury*, 116 Conn. 253, 188 Atl. 433, 435; *Re Taxes Bishop Estate*, 27 Haw. 190, 195.

On page 25 of petitioner's brief, Schmutz, Appraiser's Handbook is quoted as stating that in the selection of a rate of capitalization lies a great danger, since the difference between a 5% and 6% rate will occasion a difference of 20% in the value estimate. But Schmutz does not say that capitalization of income is not a proper and accepted method of estimating values. On the contrary, a substantial portion of his book is devoted to a discussion of that method, and its application. He says (p. 7) "The processing of factual data into value estimates may be accomplished by any of these approaches, all of which are desirable although not equally so at all times. They are: (1) The comparative approach; (2) The reproduction cost approach; (3) The capitalization approach." All Mr. Schmutz was concerned about was the selection of the proper rate for capitalization.

What the author there stated with respect to rates of capitalization would equally apply to the difficulty of ascertaining market value by other means than the capitalization of rental value. An examination of condemnation cases involving the market value of land will show that opinions of witnesses are often widely divergent without any question of capitalization of rent being involved. In any event, the court or jury is obliged to wrestle with sharply conflicting opinions frequently more divergent than the 20% which troubled Mr. Schmutz.

The Government in the trial court evidently believed that capitalization of rentals was a proper basis for an estimate of market value, for it introduced evidence on the point. On rebuttal Crozier, in response to questions by Government counsel, testified that 6% was the proper, reasonable and fair rate of capitalization in Honolulu (R 378-9). The issue therefore left to the jury was whether 4% or 5% as contended by the owners' experts, or 6% as contended by the Government experts, or some other rate or no rate was proper. The jury was not bound by the testimony of either, but was free to choose such rate or no rate as under the evidence it found proper.

The proper rate of capitalization to be used turns to a large extent upon the value of money and its earning power, which, it is common knowledge, has decreased in recent years.

Opinions of experts are taken in condemnation cases to help the court or jury in determining market

value. Petitioner's theory seems to be that while the owners' witnesses properly stated their opinions that portions of these tracts were more valuable for truck farming than for cane cultivation, they should not have been permitted to say they had a higher rental value because of the potential better use. We submit that the authorities do not sustain that contention.

Proof of Market Value.

The owners' witnesses testified to the market value of the land at the date of taking based on its adaptability for residence, business and truck farming, for which they testified there was a present and continuing demand. As pointed out, they did not base their opinions on the speculative profits of a subdivision.

The market value of land cannot be demonstrated mathematically. It necessarily rests in opinion, and like that of other commodities, depends largely on the law of supply and demand.

That there was a demand for this property in subdivided lots for residence and business purposes and for small farm areas was amply shown, as already pointed out.

The existence of a demand is an important factor which must be taken into consideration in ascertaining value for a potential use. *Olson v. United States,* 292 U.S. 246, 256; *Vineyard Grove Co. v. Oak Bluffs,* 265 Mass. 270, 163 N.E. 888, 891; *Sullivan v. Missouri K. & T. R. Co.,* 29 Tex. Civ. App. 429, 68 S.W. 745, 747.

Demand has a bearing on the difference between probability and possibility which distinguishes potential use from mere speculative hazards. *Chicago B. & Q. R. Co. v. Chicago,* 166 U.S. 226, 250. Hence the distinction between what land may be worth in the future, and what it is worth now in view of the future. *Portland & R. R. R. v. Inhabitants of Deering,* 78 Me. 61, 2 Atl. 670, 671.

No evidence should be excluded which an ordinarily prudent man would take into account before forming a judgment as to the market value of property which he is about to purchase. 29 *C. J. S.;* p. 1261, Sec. 273; 2 *Nichols, Eminent Domain* (2nd ed.), p. 1168, Sec. 444; *State v. Styner,* 58 Ida. 233, 72 Pac.(2) 699, 704; *Ranck v. Cedar Rapids,* 134 Ia. 563, 111 N.W. 1027, 1028; *North American Tel. Co. v. Northern Pac. R. Co.,* 254 Fed. 417, 419 (C.C.A. 8).

The value of property as an investment is properly considered in determining market value. *United States v. Powelson,* 118 Fed. (2) 79, 86; *Gearhart v. Clear Spring Water Co.,* 202 Pa. 292, 51 Atl. 891, 892.

That is the point that Mr. Russell, one of the owners, stressed when he expressed his conclusion.

And plans of the owner for the development of the property may be shown. *McCandless v. United States,* 298 U.S. 342, 343; *Crystal City R. Co. v. Isbell,* 126 S.W. (Tex.) 47; *Union Electric L. & P. Co. v. Snyder Estate Co.,* 65 Fed. (2) 297, 304; *United States v. Powelson,* 118 Fed. (2) 79, 84. All values are anticipations of the future. *Lincoln v. Commonwealth,* 164 Mass. 368, 41 N.E. 489, 491.

There was nothing fantastic or speculative, we submit, in the testimony of the owners' witnesses concerning the suitability of these tracts for subdivision, the demand for lots, and the estimates of the value of the tracts based on the capitalization of the then rental values. None of those factors would have been overlooked by an intelligent buyer. That the buyer's conclusion may have differed from that of the witnesses, as the verdicts indicated, does not render the testimony improper.

The weight to be accorded to opinion evidence, depends on the reasons assigned for the conclusions of the witnesses, and is for the jury to determine. *People v. McReynolds,* 31 Cal. App. (2) 219, 227, 87 Pac.(2) 734, 739.

The Evidence Complained of Was Brought Out by the Government and Its Admission Is Therefore Not Error.

The owners' case in chief consisted of showing (1) that the property when taken was then in demand as to 40 acres for residence and business purposes, and as to 292 acres for market farming, and (2) that the market value thereof at date of taking, having in mind such uses, was as stated by its expert witnesses and one of the owners. None of these witnesses testified on direct examination what the lands would sell or rent for after subdivision; their testimony was confined to what the lands would sell for at date of taking, having in mind their potential use for subdivision and truck farm use, and some of the witnesses in fixing such values did so by first estimating

the rental values of the farm area in its then condition and by then capitalizing such rental value.

The only estimates of what the land would sell for in its subdivided state, or the profit that a purchaser would make who later subdivided or sold, were brought out by the Government on cross-examination. Furthermore, having brought the matter out on cross-examination, the Government pursued the matter by introducing evidence on the same subject, in an effort to show that the testimony of the owners' witnesses was not sound and therefore not to be accepted. Under such circumstances the Government cannot complain if its motion to strike was denied.

As pointed out in the *Miller* case, "even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety" and "involves at best a guess by informed persons" (*United States v. Miller,* 317 U.S. 369, 374).

The question of value is for the jury, which is not bound by the opinion testimony, and gives to it only such weight as it believes it justifies. The testing of the witnesses' qualifications, assumptions and reasoning by cross-examination, is the proper and prescribed method of exposing to the jury the lack of value of the witnesses' opinion. For that reason cross-examination of the widest latitude is permitted.

Here the owners' witnesses having testified on direct to the market value at the time of taking, having in mind the higher use, it was appropriate for

the Government by cross-examination to endeavor to discredit such testimony by showing that their assumptions were ill founded and their conclusions invalid. The owners' witnesses having testified that 40 acres were suitable and in demand for residences and business, and 292 acres for small farms, instead of for cane growing as the Government contended, and having given in support of their opinions, the rentals that could be obtained for farm lands, and the capitalization thereof at various rates, the Government was entitled to and did, exhaustively cross-examine them as to their assumptions and the basis therefor. It asked the witnesses how a willing buyer would subdivide the land, what the lots and farms would rent or sell for, what improvements would be required, what profits the subdivider would make, what the ratio between market value and the gross selling prices after subdivision would be, and finally what was the proper rule of capitalization to translate rental income into fee market value. Moreover, the Government introduced evidence on the issue of the proper rate of capitalization, on the ratio between the gross selling price of subdivided land and the market value before subdivision, and on the availability of other lands. It showed the prices at which other subdivisions had been sold, and in every way tried to show the jury that the valuation estimates of the owners' witnesses were not well founded. All this went to the weight of the evidence and not to its admissibility.

The testimony of which petitioner complains was not elicited by the owners but by the Government on cross-examination of the owners' witnesses.

A party who on cross-examination of an expert witness asks him to give his reason for his opinion cannot object to the answer on the ground that it is inadmissible. A party who himself elicits testimony cannot object to its admissibility. 4 *C. J.*, p. 703, Sec. 2613; *Fidelity & Casualty Co. v. Griner,* 44 Fed. (2) 706, 709; *Reed v. Prudential Ins. Co.,* 229 Mo. App. 90, 73 S.W. (2) 1027, 1033; *Schulmeyer's Guardianship v. McAllister,* 171 Cal. 340, 153 Pac. 233, 235; *Behrenfeld v. Breedlove,* 27 Cal. App. 419, 150 Pac. 71, 72; *Brownell v. Moorehead,* 65 Okl. 218, 165 Pac. 408, 410.

By way of illustration, we may refer to the testimony concerning Lot D, the Gore lot, which contains an area of 61 acres.

Harrison, on his direct examination, testified that in his opinion the market value of that tract in November, 1940, was $63,449 (R 205, 206). In that connection he made no reference to any subdivision nor did he mention rental value or buyer's profit.

On cross-examination, he said he had assumed a subdivision of a portion of the tract containing 16 acres into 77 lots, putting a value on each lot at 12½ cents per square foot when subdivided, which would reflect a value for that portion of the tract of $88,223.12 (R 210, 211). The rest of the area, amounting to 41 acres, he valued, as of November, 1940, as

having a rental value of $33.58 per acre per annum, which he capitalized at 5% (R 217).

On redirect, the witness made it clear that the figure $88,223, which he mentioned on his cross-examination, was what he believed the willing buyer could have sold the 77 lots for (R 221, 222).

The witness Kearns, on his direct examination, testified that in his opinion a willing buyer would have paid a willing seller for the Gore lot in November, 1940, $63,449, considering a portion of it for subdivision into residence lots and the rest as acreage for truck farming (R 240-242), and that the buyer would have made a profit (R 241, 247).

The witness made no reference to the number of lots the residence area could be divided into, nor to what they might be sold for, nor to the amount of profit the buyer could make.

On cross-examination the witness said that if a buyer paid $63,449, plus expenses (of subdivision), and sold for $116,357, he would have realized a profit of approximately 16% (R 248). He assumed a subdivision of a portion of the tract into 77 lots, comprising 705,785 square feet, valued at 12½ cents per foot, which would show a total value of $88,223 (R 261). The rest of the area of the lot, 41 acres, he valued (as of November, 1940) at $671.60 per acre for truck farming, based on the capitalization of the rental value at 5% (R 262).

How the buyer might have subdivided the potential residence areas, how many lots he may have made out

of those areas, how much he could have sold the lots for, or how much profit he might make if he had bought at the market values stated by the witnesses for the owners, formed no part of their case, and the witnesses were not questioned on direct examination upon those particulars, as an examination of the record will show.

Whatever there is in the record with reference to such matters, was elicited by counsel for the Government on cross-examination (R 211, 212, 215, 218, 260, 261).

A very broad latitude is allowed in the cross-examination of an expert witness to the end that his experience and judgment and the value of his opinion may be thoroughly tested. Such cross-examination, however, though it may materially affect the weight of the testimony given, does not affect its admissibility. *Stockton v. Ellingwood,* 96 Cal. App. 708, 275 Pac. 228, 234; *Metropolitan Water Dist. v. Adams,* 116 Pac.(2) 7, 20 (Cal.); *Los Angeles v. Deacon,* 119 Cal. App. 491, 7 Pac.(2) 378, 379.

Competent evidence given by an expert witness is not to be stricken merely because the cross-examination may have affected its weight. *Oakland Water Front Co. v. Le Roy,* 282 Fed. 385, 387; *Neddermeyer v. Crawford Co.,* 190 Ia. 883, 175 N.W. 339, 342.

It is stated in petitioner's brief (pp. 5, 6) that Castro and Russell fixed present value by capitalizing at four per cent the net income which in their judgment would be obtained if all the lands were leased after they were subdivided.

That statement is inaccurate.

Castro, speaking of the best and most profitable use of these tracts as of November, 1940, said, "For truck gardening purposes the land is worth $33.58 per acre per annum—the average rental per annum is $33.58 per acre" (R 159). Speaking of the Gore lot, after stating his opinion of its market value in November, 1940, to be $79,311.75 (R 160), he said, "In the first place that parcel of land as a whole * * * commands an average rental value per annum, that is, the average rental value covering the whole of $51.57" (R 160, 161). That rental value capitalized at 4% would show a market value of the tract as of November, 1940, of $79,311.75, and the willing buyer would have made a good investment at that figure (R 163). Speaking of the 192 acre tract as of November, 1940, the witness said "The value based on the earning capacity of the land and based on general conditions and various other conditions, such as the proximity to the center of the city, the fact that that is a portion of a region of land which in my opinion is one of the best future available areas for the expansion of this city, was worth $227,572.50, based on an average value of $1179.40 per acre, and this value per acre is based on the average rental value of that land of $47.176 per acre" (R 167). Asked for his opinion as to the market value of the 77 acre tract in November, 1940, the witness said that the average rental value per acre per annum was $41.25, which capitalized at 4% would show a value of $79,715.43 (R 169).

Castro's testimony was not as to what the land might be worth in the future, but as to what it was worth in November, 1940, in view of the future.

Mr. Russell considered that an investment in real estate which would yield an income of 4% on the purchase price would be a good investment (R 319). He gave his opinion of the market value of each of the three tracts as of November, 1940 (R 313, 314, 321, 325, 332). His opinion was based on the experience the Damon Estate had had in putting previous subdivisions on the market for lease (R 316, 317, 318), and on the existing demand for such lots (R 318, 326, 339, 342), and he estimated the value of the tracts on their rent-producing capacity as of November, 1940 (R 314).

That is to say, the rent-producing capacity of the land for a better and more profitable use than cane cultivation inhered in the land at that time.

On cross-examination, Mr. Russell was questioned concerning the number of lots into which the tracts might be subdivided (R 345, 353), and he stated that his opinion as to value in November, 1940, was based on rental value capitalized at 4% (R 351).

The market value testified to by Castro and Russell was not fixed present value obtained by capitalizing at four per cent the net income which in their judgment would be obtained if all the lands were leased after they were subdivided, as petitioner contends, but was based upon the rental value as of November, 1940, having in mind the potential better use of the land upon the expiration of the existing lease.

Petitioner on pages 17 and 18 of its brief says Russell spoke of the "hundreds of thousands of dollars which would have to be spent for the development of roads, streets and sewers" in the subdivision of the lands condemned.

This is inaccurate, and so indeed is the whole impression sought to be conveyed that the subdivision of 40 acres of the condemned lands into residence and housing areas, and the balance into small farms, would involve great expenditures.

The quotation from Russell's testimony was his statement with reference, not to the lands condemned, but to subdivision plans for other areas belonging to the Damon Estate, and was given as his reason why they probably would not be subdivided for a long time (R 351-2)

The evidence showed generally, that the cost of subdivision would be moderate (R 199, 244).

Under Hawaiian Practice the Evidence Offered by the Owners Was Admissible.

The land here is located in Hawaii. The trial was in the United States District Court for that territory. The practice and procedure in this case were therefore those applicable in condemnation proceedings in the courts of record of that territory. *United States Code,* Title 40, Sec. 258, provides:

> "The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of section 257 [these proceedings were taken under section 257. R 10, 41] of this title shall con-

form, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding."

This statute, although in terms limited to states, has been held applicable to the United States District Court for Hawaii. *United States v. Honolulu Plantation Co.*, 122 Fed. 581, at 586-587 (C.C.A. 9th).

While we do not find any condemnation cases involving this point in the Hawaiian Reports, there are numerous cases involving valuations for taxation, which establish that the Hawaii practice not only permits the introduction of evidence of rental values, and their capitalization, as proof of market value, but deems such evidence persuasive.

The principles governing the ascertainment of value for the purposes of taxation are the same as those that control in condemnation cases and generally in controversies involving the ascertainment of just compensation (*Great Northern Ry. v. Weeks*, 297 U.S. 135, 139).

In re Taxes of Bishop Estate, 27 Hawaii 190, involved a tax assessment on land leased in subdivisions or lots. Witnesses testified that if the tract were sold in lots "some lots might bring fifty cents per square foot but not all lots could be sold at the present time." The court commented on this evidence as follows: "Such evidence as this coming from experts familiar with real estate values is always admissible in cases

of this kind" (p. 195). The court also approved the principle of arriving at value by capitalizing estimated rentals which could be secured on new leases if the old leases had expired on the assessment date.

In re Assessment of Taxes, Estate of Carniot, 13 Hawaii 688, the court said, "In this instance we think that the rent which the land yields or is capable of yielding is a safer guide as to its value than the terms and assessments of neighboring property."

In *Tax Assessment Appeals,* 11 Hawaii 235, 237, the court declared that "Intending purchasers consider chiefly the earning power of the property in the long run as shown by its past history and future prospects and possibilities."

See, also, *Assessment of Taxes, Estate of Bishop,* 13 Hawaii 671; *Assessment of Taxes of Kapiolani Estate,* 21 Hawaii 667; *In re Taxes Hawaii Commercial & Sugar Co.,* 26 Hawaii 708; *In re Taxes Waialua Agricultural Co., Ltd.,* 30 Hawaii 755; *In re Taxes Ewa Plantation Company, Ltd.,* 30 Hawaii 775; *Re Taxes Onomea Sugar Company,* 31 Hawaii 769.

While the latter three cases involved the valuation of a going business by the capitalization of profits method, we do not cite them on the basis that what the owners were proving here was the value of a going subdivision. They are cited merely to show that in Hawaii, the ascertainment of market value by the capitalization of current returns is an accepted and approved procedure.

An examination of the authorities in eminent domain reveals that practice and procedure, particularly with respect to the admission of evidence, varies greatly in the various jurisdictions, and indeed almost every case "stands on its own bottom" because the facts involved vary so greatly.

This Court in *Waialua Agricultural Co. v. Christian*, 305 U.S. 91, stated (p. 109): "Unless there is a clear departure from ordinary legal principles, the preference of a federal court as to the correct rule in general or local law should not be imposed upon Hawaii." This attitude toward matters of substantive law seems even more apposite when relating to matters of procedure, as to which Congress has determined that local practice is to be followed in condemnation cases.

No Prejudicial Error Occurred at the Trial.

We submit we have demonstrated that the trial court committed no error. We submit, further, that if perchance any of its rulings on evidence were erroneous, it was not prejudicial error within the terms of Section 269 of the Judicial Code as amended (28 U.S.C., Sec. 391),[1] in the light of the following:

1. The jury viewed the premises, and its verdict was reasonable. The values given by the various witnesses, and the jury's verdicts, are as follows:

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1. "On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Source	Value
Government	$137,487.00
Harrison and Kearns	309,279.78
Castro	386,599.68
Russell	514,345.17
Verdicts	265,404.80

The judgments were substantially lower than the lowest appraisal of the owners' experts, and were approximately half owner Russell's appraisal.

2. The instructions to the jury were clear and comprehensive and correctly stated the law. See 5 *C. J. S.* 1034, and cases cited; *Stricker v. Scott,* 283 Mass. 12, 186 N.E. 45, 46; *Prevette v. United States,* 68 F.2d 112 (C.C.A. 4th).

These instructions (R 422) followed *Olson v. United States* (supra) as found by the Court below (R 461). They were clear on the point that future or speculative profits were not to be considered (R 427) and the judgment was to be for the then market value of the lands. The value instruction was repeated to the jury (R 436).

3. The evidence complained of was brought out on cross-examination by the Government, and therefore the Government cannot complain. *Fidelity Co. v. Griner,* 44 F.2d 706, 709; *General Tire Co. v. Brown Co.,* 46 Ga. App. 548, 168 S.E. 75, 78.

4. The Government itself introduced evidence of the character which it claims was inadmissible, i. e., profit margins, rate of capitalization, cost of improvements, sales and leases of other property, etc., and also

permitted witnesses to testify on the same matter without objection. *Morrow v. Downing,* 210 Iowa 1195, 232 N.W. 483; *Bond Bros. v. Kay,* 223 Ala. 431, 136 So. 817, 818; *Fidelity & Deposit Co. of Md. v. Bates,* 76 F.2d 160, 169 (C.C.A. 8); 5 *C. J. S.* 973-4.

Error in the admission of evidence offered by one party is cured by the act of the adverse party in offering the same evidence or bringing it out on cross-examination. *Smaha v. George,* 24 S.E.2d 385, 392 (Ga.); *Morris Plan Co. v. Universal Credit Co.,* 168 S.W.2d 136 (Mo. App.); 5 *C. J. S.* 974-977, and cases cited.

5. The Government's motions to strike the witnesses' testimony were properly refused, even if their valuation testimony was properly subject to a motion to strike (which was not the case), for the witnesses had given other testimony which was clearly admissible, and the motions were to strike all the testimony. *United States v. Becktold Co.* (C.C.A. 8), 129 F.2d 473, 480; *Koopman v. Farmers' Mut. Hail Ins. Assn.,* 209 Iowa 958, 229 N.W. 221, 223; *Perazzo v. Ortega,* 29 Ariz. 334, 241 Pac. 518; *Massor v. Yates,* 137 Ore. 569, 3 P.2d 784; *Varner's Exrs. v. White,* 149 Va. 177, 140 S.E. 128.

6. Matter brought out on cross-examination of expert witnesses, reflecting on the validity of their conclusions, goes only to its weight and is not grounds for striking out such testimony. *Ramming Co. v. United States* (C.C.A. 8), 122 F.2d 892, 894-895; *City of Stockton v. Ellingwood,* 96 Cal. App. 708, 275 Pac. 228, 234; *City of Los Angeles v. Deacon,* 119 Cal.

App. 491, 7 P.2d 378, 379; *Neddermeyer v. Crawford County,* 190 Iowa 883, 175 N.W. 339, 342.

7. The Government's motions for directed verdicts were properly refused, even if all of the owners' valuation testimony was subject to being stricken, for the jury is not bound by expert testimony and in addition it viewed the premises. *The Conqueror,* 166 U.S. 110, 132; *Whaley v. Sloss-Sheffield Steel Co.,* 164 Ala. 216, 51 So. 419, 421, 424; *Washburn v. Milw. & L. W. R. Co.,* 59 Wis. 364, 368, 18 N.W. 328, 330; 32 *C. J. S.* 405, Sec. 569.

8. The basis of the witnesses' valuations was laid bare to the jury. The rates of capitalization were given to the jury and it was free to use any rate it thought proper. Furthermore, the Government introduced evidence as to the proper rate. Error in admitting the conclusion of an expert witness may be deemed harmless where the conclusion given is a mere matter of computation, comparison or a mere estimate. 5 *C. J. S.* 995 and cases cited.

In *Welsh v. Tennessee Valley Authority,* 108 F.2d 95, 102 (C.C.A. 6), the court said:

> "The triers of the facts who saw and heard the witnesses were the best judges of the value, weight and credibility of their testimony and could best weigh the evidence."

In *Union Electric Light & Power Co. v. Snyder,* (C.C.A. 8), 65 F.(2d) 297, the court pointed out:

> "The admission of evidence touching the value of property appropriated in condemnation cases

must be left largely to the discretion of the trial judge."

In the *Model Code of Evidence,* as adopted and promulgated by the American Law Institute, May 15, 1942, it is said, respecting opinion testimony (p. 201):

> "The judge at the trial is in so much better position than an appellate court to determine whether a witness should be permitted to give opinion evidence that his rulings should be accepted save in the most exceptional circumstances."

The general rule is stated in 5 *C. J. S.* 996, as follows:

> "Error in admitting opinion evidence may be regarded as harmless where the objecting party has an opportunity to cross-examine the witness and to show the real value of his testimony. * * * Error in the admission of opinion evidence may be regarded as harmless where the opinion relates to the amount of damages recoverable, and the verdict is for a much less sum than the witness testified should be allowed, where the verdict is not excessive, or where the jury might properly have rendered a verdict for a greater amount."

SPECIFIED ERROR 2.

Petitioner asserts that the Circuit Court of Appeals erred (Pet. Br. p. 8):

> "2. In holding that elements of value arising from a landowners monopoly of undeveloped land may be included in the just compensation awarded upon condemnation of a small part of that land."

An examination of the opinion of the Court below fails to reveal any such holding (R 457).

That Court, in its recital of facts, points out that the Damon Estate owns other lands in the vicinity, and that its witnesses were asked if the opening of such lands in competition with the condemned lands, would affect their value; that one of the witnesses stated that this would have no effect, but the other witnesses stated that their valuations were based on the assumption that such remaining lands would not be thrown open in competition—this either because the Trustees so stated, or because it was assumed that the Trustees, as a matter of business policy, would not put subdivisions on the market faster than they could be disposed of (R 460).

Evidently petitioner's contention is that in some way not clear to us, error was committed because some (not all) of the owners' witnesses fixed their values on the assumption that the Damon Estate would not throw its remaining lands on the market in the near future.

How this would constitute error on the part of the Court below is not apparent. In the trial court the Government made no motion to strike the testimony of the witnesses on this ground (R 418). All of such testimony was elicited on cross-examination by Government counsel, and could have no greater effect than to discredit the testimony of such witnesses. It went to the weight of such testimony and not to its admissibility.

How much it might detract from such testimony was a question for the jury. It might not discredit it at all—for a willing buyer contemplating the purchase of these lands would take into consideration whether or not there were likely to be competitive subdivisions in the vicinity, either by the Damon Estate or others, and his opinion as to whether such was likely, would be based on the very considerations that the witnesses testified to—i. e., the past actions of the Damon Trustees, their statements as to future policy, and the business disadvantage of putting more subdivisions on the market than the market could absorb.

In any event the jury was the judge of the matter, and it was not misled, for the judge instructed (R 428):

> "In this case it is admitted without dispute in the testimony that the lands condemned are a part of a holding in the immediate vicinity, owned by the same respondents. In deciding this case, you are not to assume any particular type or policy or management on the part of the trustees with respect to the remainder of said lands. The very theory and hypothesis upon which this case is being tried is the assumption of a free and open market, of a willing purchaser and a willing buyer in a free transaction. In considering this case, therefore, you are not bound to assume that the Trustees of the Damon Estate would not release any of the lands in the immediate vicinity from their present status."

This instruction covered in substance the Government's requested instructions 8 and 9 (R 84).

Finally, it is difficult to see how the Government could be prejudiced, for it contended and introduced evidence to prove, that there were large areas of other land not belonging to the Damon Estate in the vicinity equally available and desirable for subdivision purposes, and introduced an exhibit (Ex. G) to show the location and extent of such lands (R 399, 401).

SPECIFIED ERROR 3.

Petitioner asserts that the Circuit Court of Appeals erred (Pet. Br. p. 8):

> "In holding that enhancement of value due to the project for which the lands were taken may be included in the compensation paid for such lands."

We submit that an examination of the opinion of the Court below shows that it did no such thing (R 457).

The Government at the trial made no claim and introduced no evidence to show that the condemned lands were part of a Government project, undertaken at an earlier date. This claim was only asserted after the Court below had affirmed the judgments of the trial court, and the only facts advanced in its support are quotations from testimony before a Congressional Committee printed as an appendix to petitioner's brief.

At the trial the Government did not assert, as it does here, that the passage of the appropriation act

of May 25, 1939, not only appropriated funds for a "vast extension" of Pearl Harbor Navy Yard, but also funds "to acquire the specific lands condemned in this case" (Pet. Br. p. 33). On the contrary, the Government introduced evidence, and made an offer of proof, to show that proximity of the lands to the military establishment actually decreased their value because of the likelihood of their being declared out of bounds by military authorities (R 350, 394-6) and there were other large areas equally available and desirable (394-7, Ex. G).

In addition no factual basis appears to exist for petitioner's claim that the Appropriation Act of May 25, 1939, not only appropriated funds for a vast extension of Pearl Harbor Navy Yard, but also funds "to acquire the specific lands condemned in this case" —for:

1. Two suits are involved here. One (No. 434) does not involve Navy housing at all, but was prosecuted in behalf of the Public Works Agency as recited in the petition (R 11), "for army housing" as stated by Government counsel (R 105). It recites (R 10) that the funds for the condemnation were appropriated by the Act of September 9, 1940 (Public No. 849—76th Congress), only two months before the suit was filed and not May 25, 1939, as petitioner suggests.

2. The second suit (No. 436) is for Navy housing and recites that it is brought pursuant to acts of Congress approved June 28, 1940 (54 Stat. 676), and September 9, 1940 (54 Stat. 717). The latter is an appropriation act and appropriated funds for naval

housing. No mention is made in the petition of the Act of May 25, 1939, which petitioner says is the act appropriating the funds for this condemnation (R 40).

3. The hearings recited in the appendix of petitioner's brief do not support the statement that it was these lands that Admiral Morreel referred to, or that the appropriation was required to take care of expansion of the Navy Yard authorized by the appropriation, for he testified "the lands belong to several estates" and "an area of 244 acres is classed as cane land, 48 acres are classed as pasture land, 72 acres as fish ponds and waste lands, and approximately 1½ acres are classed as semi-commercial lands" (a total of 365½ acres). The lands in these suits (totaling 332 acres) all belong to the Damon Estate and all were in cane (except 2¼ acres leased to the bank), and at the trial the Government introduced evidence to show that extensive areas, besides the Damon Estate lands were equally available and desirable, including McGrew, McCandless and Bishop Estate lands (R 399-401).

Moreover, Admiral Morreel testified (April 5, 1939) that lands were required "to meet the immediate needs to relieve the *present* acute housing situation", that the housing was intended for civilian employees and that there had not been an expansion of civilian personnel at the Navy Yard recently, thus showing that the demand was in existence at the time the bill was under consideration and was not based on a need to be created by the works contemplated in the ap-

propriation bill. (All quotations are from the appendix to petitioner's brief pp. 37-39).

Pearl Harbor Navy Yard has been in existence since 1901 when the area was acquired by the Government by eminent domain (Sec. 1 *Estees Reports* (U.S.D.C. Hawaii) 141 and *U. S. v. Honolulu Plantation Company,* 122 Fed. 581). Hickam Field was established in 1933 (R 286). The lands here were condemned in November, 1940, to provide housing for personnel presumably working in these establishments. The acquisitions do not constitute enlargements of the military reservations, and certainly do not cover lands which were included in the public project from the beginning within the meaning of *United States v. Miller,* 317 U.S. 369, where the court states the principle thus (p. 376):

> "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities."

We submit that the *Miller* case states no new principle of law, and if in fact these lands were included in "the public project from the beginning" it was the duty of Government counsel at the trial to assert and prove that fact, and to bring out evidence measuring the extent of the appreciation, if any, resulting from the fact such lands not immediately taken, increased in value due to the projected improvement. Government counsel made no such contention. On the contrary (1) he contended that there was no enhancement due to proximity to the Government establishments (R 350, 394); (2) he stipulated at the beginning of the trial that the values to be fixed were those prevailing on November, 1940, when the suits were filed (R 113); (3) he asked the Government witnesses for values as of November, 1940, in the same form as the questions later asked in behalf of the owners (R 117) and (4) he made no objection to the form of the

valuation question asked by the owners. Therefore, it must be assumed, that the Government at the trial, did not believe that any factual basis existed for the claim now being asserted by petitioner.

But even if there had been a factual basis for the claim, no error has been shown to have been committed by either the trial court or the Court below. No objection was made to any testimony on the ground now urged by petitioner. The valuation questions were properly directed to values at the date of the filing of the suits. As pointed out in the *Miller* case, the proper procedure is for the Government, if it claims the value as of the date of taking has been enhanced by the project itself, to bring that fact out on cross-examination (*United States v. Miller*, 317 U.S. 369 at 380). It certainly is not the duty of the landowner to affirmatively prove the non-existence of an appreciation in value, which he contends does not exist.

We submit, aside from the fact that the point is not available to petitioner here, because not raised in the trial court or the Court below, that no factual basis for the claim has been shown, and beyond that, no error is shown to have been committed by either court.

CONCLUSION

We submit that no error has been shown on the part of the Court below, which correctly stated and applied the law. We submit further, that no error has been shown on the part of the trial court, but on the contrary the trial was fairly conducted, the issue of value was thoroughly explored, the jury was correctly instructed, and the verdicts were reasonable.

December 27, 1943.

Respectfully submitted,

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DECISIONS PER CURIAM, ETC., FROM JANUARY 11, 1944, THROUGH APRIL 10, 1944.*

No. 209. UNITED STATES *v.* WATERHOUSE ET AL. Certiorari, 320 U. S. 723, to the Circuit Court of Appeals for the Ninth Circuit. Argued January 5, 6, 1944. Decided January 17, 1944. *Per Curiam.* Judgment affirmed by an equally divided Court. MR. JUSTICE JACKSON states that, the proceeding having been commenced, as the record shows, "under the instructions of the Attorney General" and the valuation for which the Government now contends appearing to have been fixed at the time when he held that office, he thinks it inappropriate that he should now participate in the determination of the case, notwithstanding he has no recollection of personal participation in the Departmental action. *Assistant Attorney General Littell*, with whom *Solicitor General Fahy* and *Messrs. Vernon L. Wilkinson* and *Roger P. Marquis* were on the brief, for the United States. *Mr. Herman Phleger*, with whom *Mr. A. G. M. Robertson* was on the brief, for respondents. Reported below: 132 F. 2d 699.